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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-130

TOM E. ELLIS and ROBERT D. LOVE,

Petitioners,

—v.—

FRANK M. DYSON, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

TOM E. ELLIS and ROBERT D. LOVE,

Petitioners,

—v.—

FRANK M. DYSON, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Tom E. Ellis and Robert D. Love, petition for writ of certiorari to review the *per curiam* affirmance by the Court of Appeals for the Fifth Circuit of the District Court decision dismissing the complaint for failure to state a claim for relief, without reaching the plaintiffs' motion for summary judgment or defendants' motion for abstention.

Opinions Below

The opinions of the United States District Court for the Northern District of Texas, Dallas Division, and the United States Court of Appeals for the Fifth Circuit, are not yet reported. They are set out in the Appendix, *infra*, pp. 1a, 2a.

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 16, 1973. Jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Must petitioners show bad faith, harassment or other extraordinary circumstances required by *Younger* v. *Harris*, 401 U.S. 37 (1971), when they seek federal declaratory relief from a facially unconstitutional ordinance, and when they have been once convicted under such ordinance and no municipal or state proceedings are pending?

2. Under the circumstances described in Question No. 1, and when in addition the petitioners, prior to conviction, have sought a writ of prohibition to the State's highest court, and the writ has been denied, must petitioners exhaust other state remedies prior to obtaining federal declaratory relief?

Constitutional Provisions and Statutes

Section 31-60 of 1960 Revised Code of Civil and Criminal Ordinances of Dallas, Texas, as amended by Ordinance No. 12991 is set out in the Appendix, *infra*, pp. 8a-10a.

Statement of the Case

The Petitioners, convicted under the City of Dallas Loitering Ordinance, seek to declare that ordinance unconstitutional on its face because it violates the due process clause, the equal protection clause, and the first amendment to the United States Constitution. As ancillary relief Petitioners requested the District Court to declare their arrests and convictions void and to declare that Petitioners are entitled to state that they have never been arrested or convicted under that ordinance. Petitioners also sought an injunction ordering the Respondents to expunge all references to the arrests and convictions of the Petitioners under the ordinance in question but Petitioners did not seek an injunction against future enforcement.

The ordinance in dispute provides in part:

> It shall be unlawful for any person to loiter, as hereinafter defined, in, on or about any place, public or private, when such loitering is accompanied by activity or is under circumstances that afford probable cause for alarm or concern for the safety and well-being of persons or for the security of property, in the surrounding area.

The ordinance also defines loitering to include the following activities:

> The walking about aimlessly without apparent purpose; lingering; hanging around; lagging behind; the idle spending of time; delaying; sauntering and moving slowing about, where such conduct is not due to physical defects or conditions.

On January 18, 1972, Petitioners, while driving a car, were arrested and charged with violating the loitering ordinance. Prior to trial in the Dallas Municipal Court, Petitioners applied to the Texas Court of Criminal Appeals for a Writ of Prohibition to prevent their prosecution under the ordinance on the grounds that the ordinance was facially unconstitutional (App. 21).* On February 21, 1972, the Texas Court of Criminal Appeals denied Petitioners' application for Writ of Prohibition without written opinion.

When Petitioners' cases were set for trial in the Municipal Court of the City of Dallas, they moved to dismiss on the grounds that the ordinance was violative of the United States Constitution. These motions were denied, whereupon Petitioners entered pleas of nolo contendere. They were convicted, fined and the fines were paid.

Following their convictions in the Municipal Court of the City of Dallas, Petitioners filed their complaint in the United States District Court for the Northern District of Texas, Dallas Division, seeking a declaratory judgment that the ordinance was unconstitutional and ancillary relief. Though state appellate processes were available, Petitioners presented affidavits to show state remedies were not adequate to reach the question of the ordinance's constitutionality. A statistical study of the loitering ordinance prosecutions in Dallas indicated that with an average of forty to fifty cases a month:

> "... a substantial number of the cases filed each month were dismissed or quashed prior to trial on the merits. ... of those quashed or dismissed practically all involved defendants who had pleaded *not* guilty and who were represented by counsel; conversely none of the dismissed or quashed cases involved a defendant who was *not* represented by counsel regardless of the plea entered" (App. 32-33).

* The designation "App." refers to the Appendix filed in the United States Court of Appeals for the Fifth Circuit in this case.

Affidavits of three attorneys also described a pattern of illegal arrests and acquittals in the Municipal Court, and that upon appeals and trials de novo in the Dallas County Court of Criminal Appeals, the complaints were quashed with the result that the County Court did not reach the constitutional questions (App. 26-33). Subsequent federal court interrogatories filed under Rule 33 revealed that arrests continued to be made on an average of more than two a day under the loitering ordinance (App. 55).

Without ruling upon the petitioners' motion for summary judgment and the sufficiency of the attached affidavits and interrogatories, the United States District Court for the Northern District of Texas dismissed the complaint for failure to state a claim for relief. The Fifth Circuit affirmed the District Court's decision in a *per curiam* opinion.

Reasons for Granting the Writ

The opinion in *Younger* v. *Harris*, 401 U.S. 37 (1971), spoke only to the propriety of federal declaratory or injunctive relief when state criminal proceedings are pending. *Samuels* v. *Mackell*, 401 U.S. 66 (1971), expressly reserved for future decisions the propriety of federal declaratory or injunctive relief when no state prosecutions are pending. Subsequent decisions by this Court appear to

have decided the question. Mr. Justice Brennan, in *Lake Carriers' Ass'n* v. *MacMullan,* 406 U.S. 498, 509 (1972), stated that declaratory relief may be appropriate absent pending state actions. In *Doe* v. *Bolton,* 410 U.S. 179, 188 (1973), the Court confirmed the standing of a physician, threatened with prosecution, to obtain federal declaratory and injunctive relief against the Georgia abortion statute; simultaneously the Court denied federal relief to a Texas physician against whom state criminal proceedings were then pending. *Roe* v. *Wade,* 410 U.S. 113, 126 (1973). See also *Police Department of the City of Chicago* v. *Mosley,* 408 U.S. 92 (1972). These decisions should settle the principle that federal declaratory relief is available to challenge state criminal laws if no prosecution is then pending against the plaintiff. The First, Second, Third and Ninth Circuits agree with this principle. *Wulp* v. *Corcoran,* 454 F.2d 826 (1st Cir. 1972); *Thoms* v. *Heffernan,* 473 F.2d 478 (2d Cir. 1973); *Lewis* v. *Kugler,* 446 F.2d 1343 (3d Cir. 1971); *Anderson* v. *Nemetz,* 474 F.2d 814 (9th Cir. 1973). The Fifth Circuit disagrees. *Becker* v. *Thompson,* 459 F.2d 919 (5th Cir. 1972), rehearing en banc den., 463 F.2d 1338 (1972), cert. granted sub nom. *Steffel* v. *Thompson,* 41 U.S. L.W. 3462 (U.S. Feb. 27, 1973) (No. 72-5581). The instant case was dismissed by the District Court and affirmed by the Fifth Circuit on the authority of *Becker* v. *Thompson, supra.* Accordingly, certiorari should also be granted in this case. See *Jones* v. *Wade,* Civil No. 72-1481 (5th Cir. May 30, 1973) (distinguishing *Becker* on grounds applicable to the instant case).

I.

Petitioners need not show bad faith, harassment, or other extraordinary circumstances required by *Younger* v. *Harris* when they seek federal declaratory relief from a facially unconstitutional municipal ordinance, and when they have been once convicted under such ordinance and no municipal or state proceedings are pending.

A. *No Pending Prosecutions.*

The principles of equity, comity, and federalism for which *Younger* v. *Harris* and its companion cases stand, apply with diminished force when no state prosecutions are pending against applicants for federal relief from a facially unconstitutional state law. *Lake Carriers' Ass'n* v. *MacMullan, supra* at 509; *Perez* v. *Ledesma,* 401 U.S. 82, 93 (1971) (Brennan, White, and Marshall, JJ., dissenting). See also *Wulp* v. *Corcoran,* 454 F.2d 826, 831-32 (1st Cir. 1972); *Thoms* v. *Heffernan,* 473 F.2d 478, 483 (2d Cir. 1973); *Lewis* v. *Kugler,* 446 F.2d 1343, 1347-49 (3d Cir. 1971); *Jones* v. *Wade,* Civil No. 72-1481 (5th Cir. May 30, 1973); *Becker* v. *Thompson,* 459 F.2d 919, 923-26 (5th Cir. 1972) (Tuttle, J., concurring), *rehearing en banc denied,* 463 F.2d 1338, 1339-40 (Brown, Wisdom, Goldberg, JJ., dissenting); *Anderson* v. *Nemetz,* 474 F.2d 814, 819-20 (9th Cir. 1973). When a state prosecution is pending, federal relief can at worst result in duplication of effort and lost time, but more significantly, federal intervention in such a context may reflect a "lack of confidence by federal courts in the capacity or the willingness of state courts to vindicate federal constitutional rights." *Wulp* v. *Corcoran, supra*

at 831. However, a healthy respect for the states and their systems of judicial administration does not require deference to state courts when, as here, such courts have refused to rule on constitutional issues. See *Hull* v. *Petrillo,* 439 F.2d 1184, 1188 (2d Cir. 1971). This is true regardless of whether the state simply threatens prosecution without actually bringing charges, or whether after convictions are obtained (without consideration of constitutional defenses), charges are uniformly dismissed so as to preclude resolution of the constitutional doubts with regard to the questioned ordinance.

Thus, whether Petitioners herein are considered as applicants for federal relief against threatened prosecutions, or whether they are treated as persons who have urged their constitutional defenses to no avail in state court, it remains a fact that at all federally relevant times no city or state proceedings were in progress against Petitioners, and that notions of comity and federalism do not preclude appropriate federal relief.

B. *Declaratory Relief.*

Petitioners have sought declaratory relief, not injunctive relief against future enforcement. Just as the *Younger* v. *Harris* limitations upon the availability of federal relief do not apply where there are no pending state prosecutions, so also are they less potent when declaratory rather than injunctive relief is sought. See cases cited in subsection A above. One principle of *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), which emerged unscathed after *Younger* is that a person need not test his constitutional defenses in state court before seeking federal relief if (1) no state prosecution is pending, and (2) if the state criminal statute

in question is facially unconstitutional. See the concurring opinion of Judge Tuttle in *Becker* v. *Thompson,* 459 F.2d at 923-26. *Younger* taught that federal injunctive relief is proper even though a state prosecution is pending, if and only if there is bad faith or harassing enforcement of the state statute or other extraordinary circumstances. But neither *Younger* nor its companion cases, including *Samuels* v. *Mackell,* 401 U.S. 66 (1971), purport to limit *Dombrowski's* principle in contexts in which no state prosecution is pending. While Mr. Justice Black in *Samuels* indicated that injunctive and declaratory relief would ordinarily have the same effect upon the states, his statement was expressly confined to pending-prosecution situations. *Samuels* v. *Mackell, supra* at 73.

Without conceding that injunctive relief under *Dombrowski* would not have been available to Petitioners had such relief been prayed for, it is clear that under *Zwickler* v. *Koota,* 389 U.S. 241 (1967), the district court had a duty to consider the propriety of declaratory relief independently of *Younger's* limitations on injunctive relief. The considerations that would have guided the district court are those pertinent to relief under the Declaratory Judgment Act of 1934, 28 U.S.C. §2201. The Act was passed to provide federal courts with a milder alternative to the injunction and to enable persons to test the constitutionality of a criminal statute or ordinance without having to violate it or else forego the exercise of their rights in fear of prosecution. As Mr. Justice Brennan stated in his dissent in *Perez* v. *Ledesma, supra* at 116-17, Congress rejected any attempt to condition the grant of declaratory relief upon the presence of circumstances justifying injunctive relief. Under the Declaratory Judgment Act, the

availability of an alternative adequate remedy at law will not defeat relief; nor is irreparable injury a prerequisite to declaratory relief. See *Katzenbach* v. *McClung*, 379 U.S. 294-96 (1964); *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 241 (1937).

Neither *Dombrowski* nor *Zwickler* were overruled by this Court in *Younger* and its companion cases; only lower court holdings extending their principles to pending-prosecution cases were disapproved. The case at bar stands as an example of the wisdom of this Court in preserving such principles.

II.

When petitioners, prior to conviction, have sought a writ of prohibition to the state's highest court, and the writ has been denied, petitioners need not exhaust other state remedies prior to obtaining federal declaratory relief.

A. *Exhaustion Is Not Required.*

Monroe v. *Pape*, 365 U.S. 167 (1961), indicated that because the federal remedies provided by the Civil Rights Act are intended to be supplementary to any state remedy that might be available to redress unconstitutional action under color of state law, a plaintiff need not exhaust state judicial remedies before suing under the Act. See *Gibson* v. *Berryhill*, 93 S. Ct. 1689 (1973). *McNeese* v. *Board of Education*, 373 U.S. 668 (1963), *Damico* v. *California*, 389 U.S. 416 (1967), *King* v. *Smith*, 392 U.S. 309 (1968), and *Houghton* v. *Shafer*, 392 U.S. 639 (1968), support the same principle that a federal plaintiff need not exhaust state administrative remedies. While it is true that *Monroe* v.

Pape was an action for damages, whereas the case at bar is one for declaratory relief, and that each of the cited cases turned on their facts, the instant case is one which should not require exhaustion of state judicial remedies. First, the ordinance is patently unconstitutional on its face and thus results in a pattern of illegal police practices. *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972); *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971); *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87 (1964); cf. *Thompson* v. *City of Louisville*, 362 U.S. 199 (1959). Second, the challenged law is a Dallas City ordinance, not a Texas state statute, and invalidation would not paralyze the City. Third, the Texas state judicial remedies in the case of conviction in the Municipal Court are appeal, bond, and trial de novo, and in the event of fine in excess of $100, a second appeal. Tex. Code Crim. Proc., arts. 4.03, 44.13, 44.16, 44.17 (1965). Realistically, legal expenses nullify the theoretical adequacy of relief.

Further, this action is a civil action for declaratory relief under the Civil Rights Act, not a petition for habeas corpus. Since petitioners have paid their fines, are not in custody, and are not under suspended sentences or control, habeas corpus and its requirement for exhaustion, would not be applicable. See, *Carafas* v. *LaVallee*, 391 U.S. 234 (1968); *North Carolina* v. *Rice*, 404 U.S. 244 (1971).

B. *Reasonable Exhaustion Is Satisfied by a Writ of Prohibition.*

Even assuming that some requirement of exhaustion should be applied against Petitioners, they have satisfied it. Prior to trial in the Dallas Municipal Court, Petitioners

sought a writ of prohibition in the Texas Court of Criminal Appeals, specifically challenging the ordinance on the same federal constitutional grounds which were later raised in the declaratory judgment complaint in the federal district court. The Texas Court of Criminal Appeals denied the writ when it had power to issue it. Art. 5, §5, TEXAS CONSTITUTION; see *State ex rel. Bergeron* v. *Travis County Court,* 174 S.W. 365 (Tex. Crim. App. 1915) (application heard but denied). Since the only ground Petitioners have ever raised is facial unconstitutionality of the ordinance, it is unduly burdensome to undergo trial de novo and later appeal to the court which has already denied the writ. No legitimate purpose of exhaustion, abstention, comity or federalism is served by requiring more. The highest court of the state has been given an opportunity to rule on the matter and has declined. In maintaining the delicate balance of federalism, due respect has been paid in this case to state interests.

C. *Requirement of Further Exhaustion Allows the State System to Moot Federal Constitutional Rights and Leaves Petitioners Without an Adequate Remedy.*

The *Papachristou* decision shows that the arrest under an unconstitutional vagrancy ordinance is at the heart of the violation of constitutional rights. The arrest is a police device for investigation and the conviction is secondary to police purposes. See Foote, *Vagrancy-Type Law and Its Administration,* 104 U. PA. L. REV. 603 (1956). Even if convictions are continually invalidated on technical grounds, the arrests continue and serve a police function. The same is true in this case under the Dallas loitering ordinance. Petitioners here were arrested while driving in their automobile at about midnight. The factual material presented to the District Court in affidavits and interrogatories attached to the motion for summary judgment (App. 26-33), suggests a pattern in which a person charged with violating an unconstitutional loitering ordinance admittedly has a remedy in the state court system, in the sense that if he obtains a lawyer, appeals, and asks for a trial de novo, he will probably get the conviction reversed, either by failure of the City to prosecute, or by the action of County Court of Criminal Appeals in quashing the criminal complaint. However, the person clearly has no adequate remedy under state law in the practical sense that he is not protected against re-arrest under an unconstitutional ordinance and is deprived of a federal constitutional right to move about freely in the City of Dallas. See *Jones* v. *Wade,* Civil No. 72-1481 (5th Cir., May 30, 1973) at p. 10, citing *The Supreme Court, 1970 Term,* 85 HARV. L. REV. 3, at 307 (1971). These facts were before the District Court in affidavits on a motion for summary judgment; yet that court dismissed the complaint for failure to state a claim for relief, thereby leaving the Petitioners without an adequate remedy to protect their rights, and leaving the state system to continue frustration of those rights.

D. *Superior Judicial Administration Requires a Remedy in the United States District Court.*

If the federal plaintiffs have no right to a remedy in this case, among their possible state remedies are the following: (1) Seek a pre-trial writ of prohibition in the Texas Court of Criminal Appeals (which the Petitioners did) and upon its denial, appeal to the United States Supreme Court. Under 28 U.S.C. §1257, the decision would be a final decision of the highest court in which a decision could be

had and the United States Supreme Court can then take jurisdiction to invalidate the ordinance. *Camara* v. *Municipal Court*, 387 U.S. 523 (1967).

(2) The person can appeal to the Dallas County Court of Criminal Appeals, and after posting bond of double the fine plus costs, can obtain a trial de novo. TEX. CODE CRIM. PROC. arts. 44.13, 44.16, 44.17 (1965). If he is fined in excess of $100, he can then appeal to the Texas Court of Criminal Appeals, TEX. CRIM. PROC. art. 4.03 (1965), and if the decision is affirmed, he can then appeal to the United States Supreme Court.

(3) If in the Dallas County Court of Criminal Appeals upon trial de novo, he is fined $100.00 or less, he has no further appeal in the state system. TEX. CODE CRIM. PROC. art. 4.03 (1965). At that point appeal would lie directly to the United States Supreme Court. *Thompson* v. *City of Louisville*, 362 U.S. 199 (1959).

Viewing the problem as one of judicial administration, the superior way to route this case is to provide for declaratory relief in the United States District Court. For under remedies (1) and (3), the United States Supreme Court is burdened with requests for direct review of municipal or trial court convictions from all parts of the country, without intervening appellate review decisions by any other courts. Yet the Supreme Court should act to review these cases if the ordinances are blatantly unconstitutional. On the other hand, if remedy (2) is followed, the case will probably never reach the Supreme Court, and the federal constitutional right will be mooted and will be unprotected, as outlined in part C, *supra*.

The appropriate routing here is to allow the United States District Court to review the constitutionality of the city ordinance under the Declaratory Judgment Act. A challenge to the Dallas City Ordinance is not a challenge to a Texas state statute. Accordingly, no misuse of federal judicial manpower will occur by convening a three-judge court, nor will the United States Supreme Court be burdened with yet another direct appeal. Nor are the state's interests seriously impaired. If a federal district court invalidates a city ordinance, the city council can quickly pass another ordinance drawn up constitutionally, whereas the time lag between the invalidation of a Texas statute, and the successful passage of another statute may be prolonged. Enlightened judicial administration would place the remedy in the federal District Court under the circumstances of this case.

CONCLUSION

The lower courts dismissed the instant case on the basis of *Becker* v. *Thompson, sub nom. Steffel* v. *Thompson, supra*, and certiorari has been granted therein. Even if *Steffel* is ultimately affirmed, the instant case calls for reversal because it has the following additional elements:

(1) The constitutional attack is on the face of the ordinance and not as applied;

(2) The threat of prosecution is greater because Petitioners have already been once convicted;

(3) The petitioners have been denied a writ of prohibition from the state's highest court;

(4) Affidavits were presented showing a pattern of state remedies inadequate to protect the federal constitutional rights.

For these reasons, a writ of certiorari should be granted to review the judgment of the Fifth Circuit.

Respectfully submitted,

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July 1973

APPENDIX

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 73-1190

Summary Calendar*

TOM E. ELLIS and ROBERT D. LOVE,

Plaintiffs-Appellants,

versus

FRANK M. DYSON, Individually and in his capacity as Chief of Police of the City of Dallas, Texas, *et al.*, etc.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

(April 16, 1973)

Before BELL, GODBOLD and INGRAHAM, *Circuit Judges.*

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1] See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

Opinion and Order of Dismissal of United States District Court, Northern District of Texas, Dallas Division

(Filed Dec. 13, 1972)

Tom E. Ellis and Robert D. Love, plaintiffs, filed this suit for redress of rights secured to them by the First and Fourteenth Amendments to the Constitution of the United States. This suit was instituted against certain officials of the City of Dallas, Texas, under 42 U.S.C. §1983.[1] Plaintiffs attack the constitutionality of an ordinance of the City of Dallas which prohibits loitering. They seek declaratory and injunctive relief.

The defendants moved the court to dismiss the case for lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted. Alternatively they moved the court in its discretion not take jurisdiction of this case by reason of the doctrine of abstention. The court overruled the defendants' motion to dismiss and carried the motion for abstention. In their answer defendants reurged that the complaint be dismissed. Subsequently, plaintiffs filed a motion for summary judgment.

The court has heard the arguments and considered the briefs of the parties in connection with the motion for summary judgment filed by plaintiffs and the motion for abstention filed by defendants. The court has also reconsidered the defendants' motion to dismiss which was previously denied. The court concludes that in the light of recent decisions of the Fifth Circuit hereinafter discussed the motion to dismiss should be granted.

[1] The city officials named as defendants are: Frank Dyson, chief of police; N. Alex Bickley, city attorney; Scott McDonald, city manager; Hugh Jones, clerk of the corporation court; Wes Wise, mayor.

In dismissing this case the court does not reach plaintiffs' motion for summary judgment or defendants' motion for abstention.

The complaint states that plaintiffs were arrested in the City of Dallas on January 18, 1972, and charged with violating an ordinance against loitering.[2] Plaintiffs applied to the Texas Court of Criminal Appeals for a writ of prohibition to prevent their prosecution under this ordinance. The gravamen of the application was the constitutionality of the ordinance under which plaintiffs were charged. This application was denied and the charges pending against the plaintiffs were set for trial in the corporation court of the City of Dallas. Plaintiffs moved to dismiss the charges on the ground that the ordinance was unconstitutional. This motion was denied and plaintiffs entered pleas of nolo contendere and were convicted.

In their complaint plaintiffs contend that this anti-loitering ordinance is unconstitutional "on its face" because it (1) is vague and overly broad, providing no discernible standards of conduct, and is violative of the due process clause; (2) is violative of the equal protection clause in that it depends upon the alarm or concern of a police officer as to whether the ordinance is being violated and this may vary from person to person; (3) prohibits conduct which

[2] The ordinance in dispute is Section 31-60 of the revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas. It provides in part "that no person shall loiter in, on or about any public or private place when his presence is accompanied by activity or is under circumstances affording probable cause for alarm or concern for the safety and well-being of persons or for the security of property in the surrounding area." It also defines loitering as including the activities of "walking about aimlessly without apparent purpose; lingering; hanging around; lagging behind; idle spending of time; delaying; sauntering and moving slowly about, where such conduct is not due to physical defects or conditions."

is beyond the power of a governmental authority to make illegal; and, (4) has a "chilling effect" upon the free exercise of the rights of freedom of association and assembly and freedom of speech guaranteed by the First Amendment and has a "chilling effect" upon the fundamental right of freedom of movement. Plaintiffs do not allege any bad faith prosecutions, harassment or other unusual conduct, or threat of such in the future, by any of the defendants that has caused or will cause them to suffer irreparable injury and harm unless the relief prayed for is granted.[3]

For the purpose of ruling on defendants' motion to dismiss this court has assumed as true every factual allegation in plaintiffs' complaint and also assumes that the City of Dallas will continue to enforce the ordinance and this may subject plaintiffs to future arrest and prosecution under the ordinance.

Since plaintiffs do not allege that there are pending criminal proceedings against them, this court is faced with the issue as to the propriety of granting federal declaratory and injunctive relief against possible future criminal prosecutions under an ordinance alleged to be unconstitutional on its face when there are no allegations in the complaint of bad faith prosecutions, harassment or other unusual circumstances which would cause plaintiffs to suffer irreparable injury and harm through the enforcement of the ordinance.

[3] In addition to asking this court to declare this ordinance unconstitutional, plaintiffs also ask the court to order all references to the arrests of the plaintiffs be "expunged" from police, FBI and court records and declare that if plaintiffs are ever asked if they have been arrested or convicted, they shall be entitled to answer in the negative insofar as the arrests and convictions arise from enforcement of this ordinance.

In *Younger* v. *Harris*, 401 U.S. 1 (1971), the Supreme Court laid to rest any question as to what was required for federal judicial relief in those instances where there was pending criminal prosecution by holding that such relief could not be granted except under extraordinary circumstances where the danger of irreparable injury was great and immediate. 401 U.S. at 45. The Court went on to hold that the existence of a "chilling effect" on First Amendment rights would not alone constitute a sufficient basis for prohibiting pending state action. However, the propriety of granting federal relief when no state criminal proceedings are pending was expressly reserved by the Supreme Court when it decided *Younger's* sibling *Samuels* v. *Mackle*, 401 U.S. 66 (1971). However, the Fifth Circuit in recent decisions has responded to this very issue.

In *Becker* v. *Thompson*, 459 F.2d 919 (5th Cir. 1972) the court held that the *Younger* principles applicable to pending state criminal prosecutions are also applicable in cases seeking federal equitable relief from threatened state criminal prosecution. Later decisions of the Circuit have followed this holding. *Reed* v. *Giarrusso*, 462 F.2d 706 (5th Cir. 1972).[4] *Milner* v. *Burson*, No. 71-2853 (5th Cir., December 6, 1972). The complaint in *Reed* alleged "harassment and unlawful arrest . . . done in utter bad faith." The court noted that "the complaint . . . makes allegations which if proved, would entitle them to relief even under the

[4] In *Reed* the court was initially concerned with the standing of the plaintiffs to bring the suit since this was the basis on which the district court had dismissed the complaint. The court concluded, as this court does in the case *sub judice*, that plaintiffs did have standing to sue since they had been arrested and alleged that they will continue to engage in the same conduct which brought about their arrests and that they fear future arrests and prosecutions.

stringent standards of *Younger*." *Reed*, 462 F.2d at 706, 711.

A reading of these cases leads the court to conclude that before federal declaratory or injunctive relief is available in the absence of a pending criminal prosecution there must be allegations of threatened bad faith prosecution, harassment or other unusual circumstances. In addition there must be an allegation of irreparable injury and harm to one seeking federal relief.

The only allegations in the complaint in this case which approach irreparable injury are the statements that the ordinance will have a "chilling effect" on the plaintiffs' First Amendment rights and their fundamental right of freedom of movement. The fact that the enforcement of this ordinance by the defendants would have such an effect is not enough to establish irreparable harm and injury. *Younger*, 401 U.S. at 51.

The court further notes that the plaintiffs have not alleged that they exhausted the state appeal processes after they were convicted in the corporation court. The plaintiffs could have appealed and obtained a trial de novo in the Dallas County, Criminal Court of Appeals. *Tex. Code Crim. Proc. Ann.* art. 44.17 (1965). Had they been convicted and fined in excess of $100.00, they could have appealed to the Texas Court of Criminal Appeals, the highest criminal appellate court in the State of Texas. *Tex. Code Crim. Proc. Ann.* art. 4.03 (1965). Had they been convicted and fined less than $100.00, plaintiffs would have exhausted their state remedies at that point.[5]

[5] At this stage plaintiffs had the right to appeal directly to the Supreme Court of the United States. 28 U.S.C. §1257.

For the reasons set forth above it is the opinion of the court that the defendants' motion to dismiss should be granted.

It is so ORDERED and this case is dismissed with all costs taxed against plaintiffs.

Dated this 13th day of December, 1972.

/s/ R. WM. HILL
United States District Judge

Revised Code of Civil and Criminal Ordinances of Dallas, Texas

"Section 31-60. *Loitering accompanied by activity or under circumstances affording probable cause for alarm or concern for the safety and well-being of persons or for the security of property—prohibited.*

It shall be unlawful for any person to loiter, as hereinafter defined, in, on or about any place, public or private, when such loitering is accompanied by activity or is under circumstances that afford probable cause for alarm or concern for the safety and well-being of persons or for the security of property, in the surrounding area.

For the purposes of this Section, the term *loiter* shall include the following activities: The walking about aimlessly without apparent purpose; lingering; hanging around; lagging behind; the idle spending of time; delaying; sauntering and moving slowly about, where such conduct is not due to physical defects or conditions.

For the purposes of this Section, the term *any place,* public or private, shall include, but not be limited to, the following: All places commonly known as being distinctively public, such as public streets, public restrooms, sidewalks, parks, municipal airports, alleys and buildings; all places privately owned but open to the public generally, such as shopping centers, transportation terminals, retail stores, movie theatres, office buildings, and restaurants; and, all places distinctively private, such as homes or private residences and apartment houses.

For the purposes of this Section the term *surrounding area* shall be defined as follows: That area easily and immediately accessible to the person under observation.

Without limitation, the following activities and circumstances may be considered in determining probable cause for alarm or concern:

(a) The flight of a person upon the appearance of a Peace Officer or any other person;

(b) Attempted concealment by a person upon the appearance of a Peace Officer or any other person;

(c) The systematic checking by a person of doors, windows, or other means of access to buildings, houses or vehicles;

(d) Repeated activity by a person, continuous or broken, which outwardly manifests no purpose, such as going from one place to another and back with no showing of use for such movement;

(e) Continuous presence by a person in close proximity to any building, house, vehicle or any other property or to any other person, at any time, when the activity of such person manifests possible unlawful activity, such continuous presence being for an unreasonable period of time under the circumstances then existing;

(f) A change of direction by a person upon the appearance of a Peace Officer in order to avoid meeting or crossing paths with such Officer;

(g) If on private property, the continued refusal of a person to leave such private property when requested to do so by the owner, manager, proprietor, or lessee of such property."

SECTION 2. Any person in violation of this Ordinance shall be deemed guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than $200.00.

SECTION 3. That Chapter 31 and Chapter 32 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas, save and except as amended herein, shall remain in full force and effect.

SECTION 4. The fact that Section 31-61 of Chapter 31 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas, previously passed by the City Council of the City of Dallas has been declared to be unconstitutional and unenforceable in the Courts of this State, creates an urgency and an emergency in the preservation of the public peace and general welfare and requires that this Ordinance shall take effect immediately from and after its passage and final publication in accordance with the provisions of the Charter of the City of Dallas, and it is accordingly so ordained.

APPROVED AS TO FORM:

N. ALEX BICKLEY, City Attorney

/s/ N. ALEX BICKLEY

Passed Jul 20 1970
Correctly Enrolled Jul 20 1970
N. ALEX WULK
City Attorney

ATTEST:
HAROLD G. SHANK
City Secretary.

Supreme Court, U. S.
FILED
JUL 9 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-130

TOM E. ELLIS and ROBERT D. LOVE,

Petitioners,

—v.—

FRANK M. DYSON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED JULY 16, 1973
CERTIORARI GRANTED APRIL 22, 1974

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Dates of Relevant Proceedings in Lower Courts

1. Petitioners' Complaint filed in United States District Court for the Northern District of Texas, March 27, 1972.
2. Petitioners' Argument and Authorities in Support of Complaint filed, March 27, 1972.
3. Petitioners' Three Requests for Admissions filed, March 27, 1972.
4. Petitioners' Request for Production of Documents Pursuant to Rule 34, FRCP filed, March 27, 1972.
5. Respondents' Motion to Dismiss filed, April 18, 1972.
6. Order Denying Respondents' Motion to Dismiss filed, May 1, 1972.
7. Respondents' Answer filed, May 11, 1972.
8. Responses of N. Alex Bickley and Hugh Jones to Petitioners' Requests for Admission filed, May 15, 1972.
9. Answer of Frank M. Dyson to Respondents' Answer to Requests for Admission filed, May 15, 1972.
10. Respondents' Trial Brief filed, May 22, 1972.
11. Petitioners' Trial Memorandum filed, May 22, 1972.
12. Petitioners' Motion for Summary Judgment, with Supporting Affidavit of Robert D. Love filed, July 17, 1972.
13. Respondents' Opposition to Petitioners' Motion for Summary Judgment filed, July 31, 1972.
14. Petitioners' Supplementary Request for Admissions and Interrogatories filed, November 10, 1972.

15. Respondents' Answers to Supplementary Request for Admissions and Interrogatories filed, December 15, 1972.

16. Opinion and Order of District Court Dismissing Petitioners' Complaint filed, December 13, 1972.

17. Petitioners' Notice of Appeal to Fifth Circuit filed, December 13, 1972.

18. Order of Fifth Circuit Summarily Affirming Dismissal of Petitioners' Complaint filed, April 16, 1973.

19. Petition for Certiorari Granted, April 22, 1974.

Petitioners' Complaint in the Northern District of Texas

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS
(DALLAS DIVISION)

Civil Action No. CA-3-5702 D

TOM E. ELLIS and ROBERT D. LOVE,

Plaintiffs,

—v.—

FRANK M. DYSON, individually and in his capacity as Chief of Police of the City of Dallas, Texas; N. ALEX BICKLEY, individually and in his capacity as City Attorney for the City of Dallas, Texas; SCOTT MCDONALD, individually and in his capacity as City Manager for the City of Dallas, Texas; HUGH JONES, individually and in his capacity as Clerk of the Corporation Courts of the City of Dallas, Texas; and WES WISE, individually and in his capacity as Mayor of the City of Dallas, Texas,

Defendants.

Now come TOM E. ELLIS and ROBERT D. LOVE, plaintiffs in the above styled and numbered action, and file this COMPLAINT, for a declaratory judgment and equitable relief, against the defendants herein, and show the Court the following facts:

1.

Plaintiffs invoke the jurisdiction of this court under Section *1983* of Title *42* of the United States Code, and Section 1343(3) and (4) of Title *28* of the United States Code, for redress of their civil rights and liberties; and under Section *2201* of Title *28*, United States Code, and Rule *57* of the Federal Rules of Civil Procedure, for a judgment to declare Section 31-60 of the Revised Code of Civil and Criminal Ordinances of the City of Dallas, as amended by Ordinance Number 12991, unconstitutional and void; and under Section *2202* of Title *28* of United States Code, for further necessary and proper relief as hereafter set out.

The rights, privileges and immunities sought to be redressed are those secured to plaintiffs by the First and Fourteenth Amendments to the Constitution of the United States; they are those rights, privileges and immunities identified in various decisions of the Supreme Court of the United States as "fundamental rights", rights which are so fundamental as to be guaranteed generally by the provisions of the Constitution and the Amendments thereto.

2.

Plaintiffs are, and at all times mentioned herein, were, citizens of the United States and the State of Texas.

3.

The defendants are all citizens of the United States and the State of Texas, and are residents of the City of Dallas, Texas. They may each be reached for service at their offices in the Municipal Buildings of the City of Dallas, Texas. Each defendant is sued herein in both his individual and his official capacity, to wit:

Defendant Frank M. Dyson is Chief of Police of the City of Dallas, Texas, and is made a defendant herein.

Defendant N. Alex Bickley is City Attorney of the City of Dallas, Texas, and is made a defendant herein.

Defendant Scott McDonald is City Manager of the City of Dallas, Texas, and is made a defendant herein.

Defendant Hugh Jones is Clerk of the Corporation Courts of the City of Dallas, Texas, and is made a defendant herein.

Defendant Wes Wise is Mayor of the City of Dallas, Texas, and is made a defendant herein.

Said defendants, at all times pertinent to this COMPLAINT, were serving in said official capacities.

4.

Plaintiffs were arrested on January 18, 1972, at approximately 2 a.m. o'clock, by police officers of the City of Dallas, for an alleged violation of Section 31-60 of the Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas, as amended by Ordinance 12991, a copy of which is annexed hereto as Exhibit "A" and made a part hereof for any and all legal purposes. Said arrests were the direct responsibility of defendant Wise, as Mayor; McDonald, as City Manager; and Dyson, as Chief of Police, because the police officers making said arrests and charges were acting under the orders and in the employ of the City of Dallas, and its administrative officers.

5.

Plaintiffs allege and would show this court that Section *31-60* of the Dallas City Code, as amended by Ordinance 12991, is unconstitutional on its face for the following reasons:

(1)

The provision is violative of the Fourteenth Amendment guarantee of Due Process of Law because it is so vague and overly-broad as to provide no discernible standards of conduct. Such a law fails the tests of Due Process because it fails to inform a citizen of what conduct is proscribed. In this case, the ordinance does not even provide standards from which a citizen might reasonably deduce what conduct is or is not violative of the provision.

(2)

The provision is violative of the Fourteenth Amendment guarantee of Equal Protection under law. The ordinance depends, for definition of the offense, upon the moment-to-moment alarm or concern of a policeman on his beat. Such a provision clearly violates the Equal Protection guarantee, for what may alarm or concern one police officer may not alarm or concern another officer only blocks away. Such a law results in patent denial of Equal Protection of Law, and as such, cannot stand.

(3)

The provision is an unreasonable exercise of the police power of the City of Dallas, in that it seeks to proscribe conduct which is clearly outside that which the City of Dallas may seek to control or make illegal. Such harmless conduct as "lagging behind", "ambling about without apparent purpose", or "going from place to place, and back again" is potentially made an offense under the terms of this ordinance. The sweeping scope of this ordinance means that no citizen is safe to carry on any conduct at any place in the City of Dallas, unless he can be telepathic and be assured that his behavior does not alarm or concern a police officer.

(4)

The provision is violative of, and has a chilling effect upon, the free exercise of the First Amendment rights of Freedom of Association and Assembly, as well as Freedom of Speech, and a similar chilling effect upon the fundamental right of Freedom of Movement. Section *31-60* is so sweeping in its potential applicability that any gathering, assembly, speech or other non-criminal behavior may subject the citizens of Dallas to arrest and conviction under its terms.

6.

Plaintiffs, exercising reasonable diligence, attempted to raise the issue of the unconstitutionality of this ordinance in the state courts by filing an application for a Writ of Prohibition with the Texas Court of Criminal Appeals on February 14, 1972. Subsequently, on February 21, 1972, plaintiffs' application was denied without written opinion by the Texas Court of Criminal Appeals.

7.

Subsequently, on February 22, 1972, plaintiffs' cases were called to trial in Corporation Court Number Six of the City of Dallas. At that time, plaintiffs' renewed their objection to the jurisdiction of the court on the grounds that the ordinance which they were charged with violating

was unconstitutional, leaving the court without any jurisdiction to act. Plaintiffs' motions were overruled, whereupon they entered a plea of *nolo contendere,* and were convicted of violating Section *31-60,* of the Dallas City Code. Said conviction was the direct responsibility of Defendant N. Alex Bickley, as City Attorney of the City of Dallas, and as its chief legal officer. Since the arrest of Plaintiffs, a record of the case has been and is being maintained in the offices of the Defendant, Hugh Jones, as Clerk of the Corporation Courts of the City of Dallas. Further, a record of the *arrest* is maintained in the files of the Police Department of the City of Dallas, under the care and control of Defendant Frank Dyson, and said arrest record is made available to any and all police agencies, whether local, state or federal, and may have been forwarded to other agencies or central data centers at his discretion and direction and under his authority.

8.

Plaintiffs would show the court that since an unconstitutional ordinance is no ordinance, and since any offense attempted to be established by an unconstitutional ordinance is not thereby an offense at all, it follows that any court attempting to enforce such an ordinance is acting without jurisdiction and totally *ultra vires.* Nevertheless, the respective actions of the defendants have resulted in a conviction of the Plaintiffs for a violation of an unconstitutional ordinance, and a record being made and maintained of the fact of said arrests and convictions, all of which deny to the Plaintiffs their fundamental rights, privileges and immunities as citizens of America.

RELIEF

Count I

Plaintiffs request this court to enter its judgment declaring that Section *31-60* of the Revised Code of Civil and Criminal Ordinances of the City of Dallas is facially unconstitutional.

Count II

Plaintiffs request this court to enter its judgment declaring their convictions for violation of the aforesaid ordinance to be null and void.

Count III

Plaintiffs request this court to enter its judgment declaring the arrests of the Plaintiffs for violation of said ordinance, as described herein, to be null and void.

Count IV

Plaintiffs request this court to enter an order directing the Defendant, Frank Dyson, to forthwith physically expunge from the records of the Dallas Police Department all references to the arrests of the Plaintiffs on or about January 18, 1972, for violation of Section *31-60* of the Revised Code of Civil and Criminal Ordinances of the City of Dallas.

Count V

Plaintiffs request this court to order the Defendant, Frank Dyson, to report to this court the names of any persons or agencies who may have obtained copies of the records of the arrests of the Plaintiffs as described herein,

and that the said Dyson be further ordered to notify any such persons or agencies of the judgment of this court.

COUNT VI

Plaintiffs request this court to order the Defendant, Frank Dyson, to advise the court whether or not the records of the arrests of the Plaintiffs on the aforesaid occasion have been forwarded to the Federal Bureau of Investigation. If, in fact, the records of said arrests have been forwarded to the Federal Bureau of Investigation then, in that event, Plaintiffs further request this court to enter an order directing the said Dyson to forthwith petition the Federal Bureau of Investigation for the return of all of such records.

COUNT VII

Plaintiffs request this court to enter their order directing Defendant, Hugh Jones, to forthwith physically expunge from the records of the Corporation Court of the City of Dallas all references to the convictions of the Plaintiffs on or about February 22, 1972, for violations of the aforesaid ordinance.

COUNT VIII

Plaintiffs request this court to enter its judgment declaring that the Plaintiffs, if asked if they have been arrested or convicted on any employment or financial application, shall be entitled to answer in the negative insofar as the arrests and convictions at issue herein are concerned.

WALTER W. STEELE, JR.
Attorney for Plaintiffs
3315 Daniels
Telephone: 696-2599

EXHIBIT "A"

ORDINANCE No. 12991

An Ordinance amending Chapter 31 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas by repealing Section 31-39, Section 31-60, Section 31-61 and Section 31-66, and amending Chapter 32 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas by repealing Section 32-4.1 thereof and in lieu thereof enacting a new Section known as Section 31-60; Providing that no person shall loiter in, on or about any public or private place when his presence is accompanied by activity or is under circumstances affording probable cause for alarm or concern for the safety and well-being of persons or for the security of property in the surrounding area; Defining the term *loiter;* Defining the term *any place;* Defining the term *surrounding area;* Setting forth guidelines to be used in making a determination of probable cause for alarm and concern; Providing for a fine not to exceed $200.00 for any violation hereof; Providing for a savings clause; Declaring an effective date; and Declaring an emergency.

WHEREAS, the City Council is of the opinion that the prevention of crime is in the best interest of the public; and

WHEREAS, the City Council is aware that such prevention of crime may be accompanied through diligent observation by the Peace Officers of the State of all places, both public and private; and

WHEREAS, the City Council recognizes that such observation may cause the Peace Officers of the State to become

aware of many and various activities and circumstances which would allow the Officers probable cause to believe that criminal activity is about to take place; and

WHEREAS, the City Council further recognizes that the mere observation of such activities and circumstances would not, in and of itself, prevent the probable criminal activity, without a right of the Peace Officers of the State to arrest persons involved in such activities and circumstances; and

WHEREAS, the City Council is of the opinion that the only public officials available, both in man power strength and through proper training, to make on the spot determinations of probable ~~cause, are~~ the Peace Officers of the State; and

WHEREAS, the City Council desires to preserve the rights of the individual, guaranteed to him by the Constitution of the United States and by the Constitution of the State of Texas; and

WHEREAS, the City Council considers that the best interest of the public and the individual are to be served by providing guidelines for Law Enforcement Officials which will enable those Officials to make more objective decisions as to whether or not there is probable cause to believe criminal activity is about to result; and

WHEREAS, the City Council is of the opinion that Law Enforcement Officials, using the prepared guidelines, will be able to prevent many probable criminal acts; Now Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That Chapter 31 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas, be and the same is hereby amended by repealing Section 31-39, Section 31-60, Section 31-61, and Section 31-66 thereof, and that Chapter 32 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas, be and the same is hereby amended by repealing Section 32-4.1 thereof, and in lieu thereof enacting a new section known as Section 31-60 which shall read as follows:

"SECTION 31-60. *Loitering accompanied by activity or under circumstances affording probable cause for alarm or concern for the safety and well-being of persons or for the security of property—prohibited.*

It shall be unlawful for any person to loiter, as hereinafter defined, in, on or about any place, public or private, when such loitering is accompanied by activity or is under circumstances that afford probable cause for alarm or concern for the safety and well-being of persons or for the security of property, in the surrounding area.

For the purposes of this Section, the term *loiter* shall include the following activities: The walking about aimlessly without apparent purpose; lingering; hanging around; lagging behind; the idle spending of time; delaying; sauntering and moving slowly about, where such conduct is not due to physical defects or conditions.

For the purposes of this Section, the term *any place,* public or private, shall include, but not be limited to,

the following: All places commonly known as being distinctively public, such as public streets, public restrooms, sidewalks, parks, municipal airports, alleys and buildings; all places privately owned but open to the public generally, such as shopping centers, transportation terminals, retail stores, movie theatres, office buildings, and restaurants; and, all places distinctively private, such as homes or private residences and apartment houses.

For the purposes of this Section the term *surrounding area* shall be defined as follows: That area easily and immediately accessible to the person under observation.

Without limitation, the following activities and circumstances may be considered in determining probable cause for alarming concern:

(a) The flight of a person upon the appearance of a Peace Officer or any other person;

(b) Attempted concealment by a person upon the appearance of a Peace Officer or any other person;

(c) The systematic checking by a person of doors, windows, or other means of access to buildings, houses or vehicles;

(d) Repeated activity by a person, continuous or broken, which outwardly manifests no purpose, such as going from one place to another and back with no showing of use for such movement;

(e) Continuous presence by a person in close proximity to any building, house, vehicle or any other

property or to any other person, at any time, when the activity of such person manifests possible unlawful activity, such continuous presence being for an unreasonable period of time under the circumstances then existing;

(f) A change of direction by a person upon the appearance of a Peace Officer in order to avoid meeting or crossing paths with such Officer;

(g) If on private property, the continued refusal of a person to leave such private property when requested to do so by the owner, manager, proprietor, or lessee of such property."

SECTION 2. Any person in violation of this Ordinance shall be deemed guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than $200.00.

SECTION 3. That Chapter 31 and Chapter 32 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas, save and except as amended herein, shall remain in full force and effect.

SECTION 4. The fact that Section 31-61 of Chapter 31 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas, previously passed by the City Council of the City of Dallas has been declared to be unconstitutional and unenforceable in the Courts of this State, creates an urgency and an emergency in the preservation of the public peace and general welfare and requires that this Ordinance shall take effect immediately from and after its passage and final publication in accordance with the

provisions of the Charter of the City of Dallas, and it is accordingly so ordained.

APPROVED AS TO FORM:

N. ALEX BICKLEY, City Attorney

ATTEST:
Harold G. Shank
City Secretary

PASSED: July 20, 1970

CORRECTLY ENROLLED July 20, 1970 N. Alex Bickley
City Attorney

Respondents' Answer in the Northern District of Texas

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[CAPTION OMITTED]

DEFENDANTS' ANSWER

To the Honorable Judge of Said Court:

NOW COME the Defendants FRANK M. DYSON, N. ALEX BICKLEY, SCOTT MCDONALD, HUGH JONES and WES WISE, individually and in their official capacities, and file this their Answer and say as follows:

First Defense

I.

Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

Second Defense

II.

Plaintiffs' Complaint fails to allege a cause of action or basis for bringing into play the equitable jurisdiction of the Federal Court in the form of a declaratory judgment and mandatory injunction as prayed for by Plaintiffs.

Third Defense

III.

The declaratory judgments and injunctive relief as prayed for herein should not be granted as a matter of course. Such relief is a matter for sound judicial discretion that should be exercised in favor of Defendants for the following reasons:

(1) There are no allegations in Plaintiffs' Complaint that Defendants have acted in bad faith or committed any act of harassment against Plaintiffs.

(2) There are no allegations of irreparable injury or harm.

(3) There are no allegations that Plaintiffs were prosecuted in bad faith. Plaintiffs' allegations show that they entered pleas of Nolo Contendere to the charges presented in the Municipal Court and did not exercise their rights of appeal from such convictions, thereby waiving their right to litigate, in the Texas Appellant Courts, the questions presented in their Complaint.

(4) Plaintiffs were represented by counsel in the Municipal Court proceedings and were fully advised of their right to a trial in said court, and the right to appeal from their pleas of Nolo Contendere.

(5) Plaintiffs' Complaint does not show that Plaintiffs have been threatened with bad faith prosecution in the future. The allegations in said Complaint concerning possible future arrest and conviction of "citizens" are imaginary and speculative.

(6) Plaintiffs, and any other person charged under this ordinance, have an adequate remedy by defending against a single criminal prosecution in the State Court.

Fourth Defense

IV.

This is a proper case for the Court to apply the Doctrine of Comity and the Doctrine of Abstention to Plaintiffs' Complaint and prayer for relief for the reasons stated in Paragraph III above.

Fifth Defense

V.

In answer to Plaintiffs' Complaint, Defendants say as follows:

(1) Defendants admit that Plaintiffs have sought to allege jurisdiction under certain provisions of the law as contained in Paragraph 1 of Plaintiffs' Complaint but deny that Plaintiffs' Complaint is sufficient to support jurisdiction as alleged.

(2) Defendants admit Paragraphs 2 and 3.

(3) Defendants admit the allegations contained in Paragraph 4 except for that portion that alleges said arrests were the *direct* responsibility of Defendants Wise, McDonald and Dyson. Defendants admit that the arresting officers were in the employ of the City of Dallas as peace officers and as such were acting under the laws of the State of Texas, ordinances of the City of Dallas, and the general orders of the Dallas Police Department.

(4) Defendants deny the allegations contained in Paragraph 5, Subsections (1), (2), (3) and (4), of Plaintiffs' Complaint and say that said Ordinance No. 31-60 is constitutional and valid. Defendants specifically deny that said ordinance violates the First or Fourteenth Amendments.

(5) Defendants admit that Plaintiffs filed a writ of prohibition with the Texas Court of Criminal Appeals which was denied as alleged in Paragraph 6. Defendants deny that this was a timely, reasonable or proper manner in which to raise the constitutionality of said ordinance and say that the laws of the State of Texas provide an orderly procedure for appeal of criminal cases which was not followed by Plaintiffs.

(6) Defendants admit the allegations in Paragraph 7 of Plaintiffs' Complaint except Defendants deny that the convictions were the "direct responsibility" of Defendant Bickley. Defendants also deny that Plaintiffs effectively raised the constitutional issue under the State Court practice by pleading Nolo Contendere in the Municipal Court, which is not a court of record, and by failing to pursue their appeals to the County Criminal Court of Appeals, a court of record, where trial de novo would be provided.

(7) Defendants deny the contentions contained in Paragraph 8 of Plaintiffs' Complaint.

(8) Defendants deny that Plaintiffs are entitled to the relef sought in Counts I, II, III, IV, V, VI, VII and VIII of Plaintiffs' Complaint. In connection with Count VII Defendant Dyson says that records of arrests of Plaintiffs have not been forwarded to the Federal Bureau of Investigation.

First Affirmative Defense

VI.

Section 31-60 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas is a constitutional and valid ordinance passed by the City Council of the

City of Dallas based upon the legislative history as contained in the said ordinance, a copy of which is attached to Plaintiffs' Complaint as Exhibit A. The ordinance is a valid exercise of the police powers of a municipality under the laws of the State of Texas and has a legitimate and useful purpose. The ordinance is designed to preserve the rights of individuals and to protect the public from criminal acts.

Second Affirmative Defense

VII.

Section 31-60 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas is not facially unconstitutional and was not enforced in bad faith against Plaintiffs.

Third Affirmative Defense

VIII.

The Texas laws provide an adequate remedy for any person charged with a violation of Section 31-60 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, and Plaintiffs herein have failed to comply with the established procedures for adjudicating the merits of their case in the State Courts and are therefore estopped from attacking the said ordinance and their final conviction thereunder in this Court.

Fourth Affirmative Defense

IX.

Each Defendant herein says that under the allegations of Plaintiffs' Complaint he is not subject to suit and that a

legal cause of action has not been alleged against him either in his individual capacity or official capacity.

WHEREFORE, PREMISES CONSIDERED, Defendants move the Court to dismiss Plaintiffs' Complaint and to exercise its judicial discretion and abstain from hearing said Complaint or in the alternative to deny all relief sought by Plaintiffs herein, and Defendants pray that they recover their costs herein expended.

Respectfully submitted,

N. ALEX BICKLEY,
City Attorney

THOMAS B. THORPE,
Assistant City Attorney

JOSEPH G. WERNER,
Assistant City Attorney

DOUGLAS H. CONNER,
Assistant City Attorney

Attorneys for Defendants
501 Municipal Building
Dallas, Texas 75201
748-9711, Ext. 294

[Certificate of Service omitted in printing]

Requests for Admissions From Respondent Frank M. Dyson

[CAPTION OMITTED]

PLAINTIFFS, Tom E. Ellis and Robert D. Love, request defendant, FRANK M. DYSON, within 45 days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at trial:

That each of the following statements is true:

(a) You are the Chief of the Dallas Police Department.

(b) As Chief of the Dallas Police Department you intend to continue to enforce Section 31-60 of the Revised Code of Civil and Criminal Ordinances of the City of Dallas.

(c) On January 18, 1972 at approximately 2 o'clock a.m. the plaintiffs were arrested by Dallas Police Department officers and charged with violating Section 31-60 of the Revised Code of Civil and Criminal Ordinances of the City of Dallas.

(d) A record of the arrest mentioned above is maintained in the files of the Dallas Police Department.

(e) Information contained in the arrest records as maintained by the Dallas Police Department is available to other law enforcement agencies upon their request.

(f) That records of Plaintiffs' arrests in this instance have been forwarded to the regional data center maintained by the Texas Department of Public Safety. That records of Plaintiffs' arrests have been forwarded to the National Crime Information Center maintained by the Federal Bureau of Investigation.

(g) That of the present date, the Dallas Police Department is continuing to enforce the ordinance referred to as Section 31-60 of the Revised Code of Civil and Criminal Ordinances of the City of Dallas.

WALTER W. STEELE, JR.
Attorney for Plaintiffs
3315 Daniels
Dallas, Texas 75205
Phone 692-2599

Requests for Admissions From Respondent Hugh Jones

[CAPTION OMITTED]

PLAINTIFFS, Tom E. Ellis and Robert D. Love, request defendant, HUGH JONES, within 45 days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at trial:

That each of the following statements is true:

(a) On February 22, 1972 Plaintiffs were convicted in Corporation Court No. 6 of the City of Dallas for violating 31-60 of the Revised Code of Civil and Criminal Ordinances of the City of Dallas.

(b) A record of these convictions is maintained in the records of the corporation courts of the City of Dallas.

(c) The records of conviction in the corporation courts of the City of Dallas are open to inspection by the public.

WALTER W. STEELE, JR.
Attorney for Plaintiffs
3315 Daniels
Dallas, Texas 75205
Phone 692-2599

Petitioners' Request for the Production of Documents Pursuant to Rule 34 F.R.C.P.

Plaintiffs, Tom E. Ellis and Robert D. Love, request defendant Frank M. Dyson to respond within 45 days to the following request:

(1) That defendant Dyson, his staff and subordinates, produce and permit plaintiffs to inspect and copy each of the following documents:

(a) The arrest report filed by the police officer(s) who arrested plaintiffs at about 2 o'clock a.m. on January 18, 1972.

(b) The arrest record initiated by and maintained in the Dallas Police Department relative to each of these plaintiffs.

(c) Any and all other records and reports relating to or bearing the names of the plaintiffs herein, and growing out of their arrests on January 18, 1972.

(2) That the defendant Dyson arrange for inspection and copying of each of the documents stated above on or before May 10th, 1972. Plaintiffs are willing to carry out this inspection and copying at the convenience of defendant Dyson, during normal business hours, if this informal procedure is acceptable to defendant Dyson and his superiors, defendants Scott McDonald and Wes Wise.

WALTER W. STEELE, JR.
Attorney for Plaintiffs
3315 Daniels
Dallas, Texas 75205
Phone 692-2599

Hugh Jones' Answers to Request for Admissions

COMES NOW Defendant HUGH JONES and makes the following answers to Request for Admissions filed by Plaintiffs on March 27, 1972:

(a) Admitted

(b) Admitted

(c) Admitted

THOMAS B. THORPE
Attorney for Defendant
501 Municipal Building
Dallas, Texas 75201
748-9711, ext. 294

Frank M. Dyson's Answers to Request for Admissions

[CAPTION OMITTED]

COMES NOW Defendant FRANK M. DYSON and makes the following answers to Request for Admissions filed by Plaintiffs on March 27, 1972:

(a) Admitted

(b) Admitted

(c) Admitted

(d) Admitted

(e) Admitted

(f) Denied

Denial based upon best information and belief available that Plaintiff's Records of Arrest were not forwarded to any other agency. It is the general policy of the Dallas Police Department that records of arrest for ordinance violations as indicated in this case are not routinely forwarded to the Federal Bureau of Investigation or the Texas Department of Public Safety.

(g) Admitted.

THOMAS B. THORPE
Attorney for Defendant
501 Municipal Building
Dallas, Texas 75201
748-9711, ext. 294

Petitioners' Application for a Writ of Prohibition to the Texas Court of Criminal Appeals

IN THE

COURT OF CRIMINAL APPEALS
OF TEXAS

[CAPTION OMITTED]

To the Said Honorable Court:

COME NOW, TOM E. ELLIS and ROBERT D. LOVE, Relators herein, and respectfully represent to and show this Honorable Court:

I.

The Relators herein, Tom E. Ellis and Robert D. Love, are residents of the City of Dallas, Texas.

The Respondent, Harold C. Dimon, Judge of Corporation Court Number 6 of the City of Dallas, Texas, is vested with authority to adjudicate cases arising under the ordinances of the City of Dallas.

II.

Relators were arrested on Tuesday, January 18, 1972, at about 2 a.m. o'clock, and charged by the City of Dallas with violation of Section 31-60 of the 1960 Revised Code of Civil and Criminal Ordinances of Dallas, Texas, as amended by Ordinance Number 12991, commonly called and charged as "loitering". Relators have each posted bonds of $52.50 and the case has been set down for trial on February 22nd,

1972, in Corporation Court Number 6, at 6 p.m., in the City of Dallas, Texas.

III.

This Honorable Court has jurisdiction to issue the Writ of Prohibition by virtue of Article V, Section 5 of the Constitution of Texas.

IV.

Relators would show this Honorable Court that said Corporation Court Number 6 has no jurisdiction of this case because the section of the Dallas City Code under which it is brought is unconstitutional and therefore void. A law which is unconstitutional and void confers no jurisdiction on said Corporation Court Number 6; therefore, the Corporation Court Number 6 is exceeding its jurisdiction, and proceeding without jurisdiction in this case.

A copy of Section 31-60 of the Dallas City Code is attached hereto as Exhibit "A" and is expressly made part hereof for any and all purposes.

V.

Said section, commonly called and charged as "loitering", is unconstitutional on its face as a violation of the rights and privileges guaranteed to Relators by and through the Constitution of the United States, for the following reasons:

a. The provision denies Relators due process of law because of vagueness and over-broad wording, which makes it impossible for Relators to determine its meaning in order that they may regulate their conduct in accordance with the terms of the ordinance.

b. The provision denies Relators equal protection of law because it depends for definition of the offense upon the moment-by-moment opinions and suspicions of a police officer on patrol.

c. The provision is an unreasonable exercise of police power in violation of the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the United States Constitution, because it condemns as illegal conduct which is clearly outside that which may reasonably be controlled and proscribed by the City of Dallas, and which the City of Dallas may seek to regulate.

d. The provision violates the Fourth and Fourteenth Amendments to the United States Constitution because it permits arrest on the basis of alarm or concern only. Relators would show this Honorable Court that, while the provision is framed in terms of "probable cause", a full reading reveals that merely arousing alarm or concern of a police officer is made an offense under this ordinance.

VI.

Relators would further show this Honorable Court that no adequate remedy at law exists in this case. The Corporation Courts of the City of Dallas have entertained over two hundred cases charging "loitering" in the past six months, the Relators represent and would show this Honorable Court that of those prosecutions, the City of Dallas, by and through its Corporation Courts, and the County Appellate Court, Judge Newton Fitzhugh, Presiding Judge, have dismissed practically every case wherein the defendant sought trial on the merits. (See Exhibits B-E). The effect of this action is to deny any remedy-at-

law, by way of the normal appellate processes, wherein the issue which Relators raise herein, (i.e. the constitutionality of said Section 31-60) might be heard in a court of record. Exhibits B through E are attached hereto and made part hereof for any and all legal purposes.

VII.

Relators represent to, and would show this Honorable Court, that they have good reason to believe, and do believe, that as a result of the previous dismissals by the Corporation Court of Dallas, Texas, their cases will also be dismissed prior to trial on the merits. Relators would show this Honorable Court that, under those circumstances, they cannot vindicate their rights by defending against one criminal prosecution, but rather, that they and all others charged under this ordinance face continued prosecution, which under these circumstances constitutes *de facto* harassment contrary to the guarantees of the Constitution of the United States.

VIII.

Relators would show this Honorable Court that the general dismissals of prosecutions for "loitering" by the City of Dallas and its Corporation Courts have left Relators with no adequate remedy save this extraordinary writ, and that said writ should therefore issue to said Corporation Court Number 6 of the City of Dallas, as a matter of right.

IX.

Relators, in the alternative to Paragraph VIII, would show this Honorable Court that the Writ of Prohibition should issue to Harold C. Dimon, Judge of the Corporation

Court Number 6, as a discretionary writ of judicial administration, to prevent further hardship being visited upon your Relators, and all other persons who may in the future be prosecuted under this unconstitutional ordinance. Relators would show this Honorable Court that the interests of justice and judicial administration can best be served by issue of the writ as prayed immediately hereafter.

WHEREFORE, premises considered, your Relators, Tom E. Ellis and Robert D. Love, pray that this Honorable Court grant the following relief:

1) Issue a Temporary Writ of Prohibition to Respondent herein, directing said Honorable Judge to desist and refrain from any further proceedings in said prosecutions of Relators for "loitering," pending a final adjudication on this Application;

2) Issue a permanent Writ of Prohibition to the Corporation Court Number 6, and all other Corporation Courts of the City of Dallas, Texas, ordering said courts to cease and desist from entertaining any further prosecutions under this unconstitutional and void ordinance, or from exercising jurisdiction over any prosecutions arising under said ordinance; and

3) Grant such further relief as this Honorable Court may deem proper.

TOM E. ELLIS
Relator

[Jurats omitted in printing]

Affidavit of Henry J. Albach, III

THE STATE OF TEXAS,
COUNTY OF DALLAS:

BEFORE ME, the undersigned authority, personally appeared HENRY J. ALBACH, III., who being first duly sworn, stated as follows:

My name is Henry J. Albach, III., and I am an adult person, have never been convicted of a felony, and am competent to make this Affidavit.

Since January of 1970 I have served as President of the Dallas Civil Liberties Union (DCLU), an organization dedicated to the protection and the preservation of the rights set forth in the Bill of Rights of the United States Constitution.

On July 20, 1970, the Dallas City Council adopted Section 31-60, known as the Dallas loitering ordinance. The DCLU was quite concerned about this ordinance and our cooperating attorneys advised that under the applicable federal and Texas cases it was patently unconstitutional. We therefore resolved to assist persons charged with loitering and to take legal action to challenge its validity.

Since July of 1970 we have been contacted by more than a dozen persons charged with loitering and at their request we asked a volunteer DCLU cooperating attorney to contact such persons. Our volunteer attorneys were in each instance authorized by such person to undertake his defense and to challenge the ordinance.

To date, more than a year and a half since this law was enacted, we have been completely unable to obtain a ruling on the constitutional question from any state or municipal court in Dallas. Most of the cases were dismissed when the complaints were quashed as being improperly worded. One case was appealed to the County Court but never came to trial because a clerk lost the docket file. One defendant, who had been in jail for three days, was released twenty minutes after a volunteer lawyer appeared at the City Jail. Two cases were tried and the Corporation Court acquitted. Two other persons, who were arrested while walking in a public park, served three days in City Jail and then had their fines reduced and were released after another of our volunteer lawyers appeared at the City Jail. In yet another case, the Corporation Court quashed the complaint, the City refiled its charges, the new complaint was then quashed, a third complaint was then filed, and was found to be sufficient, and the City then voluntarily dropped the charges and dismissed the case.

As President of the DCLU, I am extremely concerned about the continuing enforcement of this ordinance. Our cooperating attorneys, at the request and authorization of the many persons who have contacted us, have diligently represented their clients and have attempted to challenge the constitutionality of this law. To date, after hundreds of persons have reportedly been arrested for loitering, no court in Dallas has ruled on this important constitutional question. I am advised that litigants must "exhaust" their state remedies in these cases, however, the loitering ordinance will continue to be enforced unless a court of this state has an opportunity to consider the serious questions presented. I believe that this is a very important ques-

tion of law and public policy, and that a swift judicial determination of the issues presented would be in the interests of the hundreds of thousands of law-abiding citizens of Dallas who daily are guilty of "loitering" as defined in this ordinance.

HENRY J. ALBACH, III.

[Jurat omitted in printing]

Affidavit of Edward Koppman

THE STATE OF TEXAS,
COUNTY OF DALLAS.

BEFORE ME, the undersigned authority, personally appeared EDWARD KOPPMAN, who, being first duly sworn, stated as follows:

My name is EDWARD KOPPMAN and I am an attorney duly licensed to practice law in Texas, and I am practicing law in Dallas, Dallas County, Texas. I am an adult person and have never been convicted of a felony, and I am competent and qualified to make this affidavit.

During 1971, I was asked by the Dallas Civil Liberties Union to represent four persons charged by the City of Dallas with the crime of loitering and to do whatever was necessary and proper to challenge the constitutionality of the Dallas loitering ordinance, Section 31-60 of the City of Dallas Revised Code. I accepted these representations and was then expressly retained and authorized by these four persons to represent them and to so challenge the validity of the said ordinance.

On Saturday, January 23, 1971, I appeared in Dallas Corporation Court on behalf of two teenage boys who were arrested and charged with loitering for driving down an alley near the home of one of the boys. They each entered pleas of not guilty, and after the Court overruled motions to dismiss on the grounds of unconstitutionality, the cases were tried. At the close of the evidence, both moved for acquittal, and the motion was granted.

I also have represented THEO VERNELL GREEN, in Cause No. 71-228-D, and RONNIE CHARLES GRAY, in Cause No. 71-

227-D, both of whom were charged with loitering and both of whom authorized counsel to attack the constitutionality of the loitering ordinance. At their request, pleas of nolo contendere were entered in Corporation Court and the convictions were, in January of 1971, appealed to the County Criminal Court of Appeals of Dallas County, Texas. When the cases were called for pre-trial, I filed motions to dismiss on the grounds of unconstitutionality and submitted authorities to the Court in support of the motions. In August of 1971, after the Court had the motions under advisement for about five months, I checked with the Court and was advised by the Clerk that the Court, on its own motion, had quashed the complaints as improperly drawn. Mr. Gray and Mr. Jones had been arrested while standing on a street corner at night, and our evidence would have shown that they were law-abiding citizens who were innocent of any wrongdoing and of any intent to commit any substantive crime.

EDWARD KOPPMAN

[Jurat omitted in printing]

Affidavit of Robert E. Goodfriend

THE STATE OF TEXAS,
COUNTY OF DALLAS:

BEFORE ME, the undersigned authority, personaliy appeared ROBERT E. GOODFRIEND, who, being first sworn, stated: I am an adult person, have never been convicted of a felony, and I am competent to make this affidavit. I am an attorney practicing law in Dallas County, Texas, and I am duly licensed to practice law in Texas.

In August of 1970, at the request of the Dallas Civil Liberties Union, I volunteered to accept the representation of MR. EARNEST WRIGHT, who had been charged by the City of Dallas with loitering. I visited Mr. Wright at the Dallas City Jail and was specifically authorized by him to represent him and to take appropriate legal action to challenge the validity and constitutionality of the Dallas loitering ordinance.

Mr. Wright advised me that he was arrested on August 3, 1970, while he was standing on a public street in Dallas observing buses going in and out of a bus terminal. He was not charged with any other substantive crime and the evidence would have shown that he was a law abiding citizen innocent of any intention to commit any crime at the time he was arrested.

He remained in the Dallas City Jail from August 3, 1970, to August 5, 1970, at which time I conferred with him at the Jail. Following our conference, I went down to the bond desk to arrange for his release and I was then advised that the City had dropped charges and released Mr. Wright.

ROBERT E. GOODFRIEND

[Jurat omitted in printing]

Affidavit of Lon Curtis

THE STATE OF TEXAS,
COUNTY OF DALLAS:

My name is Lon Curtis. I am a senior law student at Southern Methodist University in Dallas, Texas. I live at 2933 Binkley, Apartment 44, in the city of University Park, Texas. I am twenty-five years of age.

During the preceding five months, that is, from September 1971 through January, 1972, I have been involved in a research project in conjunction with a course at the School of Law, the scope of which was to survey and study the policy and application of *Section 31-60* of the Dallas City Code, commonly called "loitering", by the police and courts of Dallas.

During the course of this research, I surveyed the court dockets of the Corporation Courts of Dallas, Texas, in order to ascertain the number of persons brought to prosecution each month for the offense of "loitering", to ascertain the disposition of these prosecutions by the Corporation Courts of Dallas, Texas, and to produce a general statistical analysis of the enforcement of this ordinance by the City of Dallas.

The results of the aforementioned research indicated that a minimum of approximately forty cases charging loitering are filed in the Corporation Courts each month. The bases for this conclusion were the court records for the period of April, 1971 through October, 1971. In several months, however, the number of loitering cases was well in excess of fifty.

The statistical study of the dockets also indicated that a substantial number of the cases filed in each month were

dismissed or quashed prior to trial on the merits. Further research indicated that of those cases dismissed or quashed, practically all involved defendants who had pleaded *not* guilty and who were represented by counsel; conversely, none of the dismissed or quashed cases involved a defendant who was *not* represented by counsel, regardless of the plea entered.

In several months, up to a fourth of all cases filed under this ordinance were either dismissed or quashed, prior to trial on the merits. Of the remaining cases, approximately a third involved bond forfeitures, and the remaining defendants either paid a fine or served jail time for the offense.

The foregoing conclusions represent over four months of critical, objective statistical analysis of the docket records of the Corporation Courts of Dallas, Texas, and are, to my knowledge, an accurate reflection of the circumstances surrounding enforcement of *Section 31-60* of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas.

LON CURTIS

[Jurat omitted in printing]

Petitioners' Motion for Summary Judgment

[CAPTION OMITTED]

In accordance with the provisions of Rule 56, Federal Rules of Civil Procedure, Plaintiffs TOM E. ELLIS and ROBERT D. LOVE, move the court for a summary judgment on the grounds that the pleadings, admissions, and other matters of record, pertinent portions of which are summarized in a statement attached hereto as Exhibit A, and the affidavit of ROBERT D. LOVE, attached hereto, show that there is no dispute as to any material fact and that the Plaintiffs are entitled to a judgment as a matter of law.

WALTER W. STEELE, JR.
Attorney for Plaintiffs
3315 Daniels
Dallas, Texas 75205
Phone: 692-2599

EXHIBIT A

SUMMARY OF MATTERS OF RECORD WHICH ARE UNDISPUTED IN THIS CASE

1. Section 31-60 of the Revised Code of Civil and Criminal Ordinances of the City of Dallas is a part of the current ordinances of the City of Dallas (N. Alex Bickley's Answer to Request for Admissions. Ordinance is attached as Exhibit A to the Complaint herein.)
2. On January 18, 1972 at about 2:00 a.m. the Plaintiffs were arrested by Dallas Police Department officers and charged with violating said ordinance (Frank Dyson's Answers to Request for Admissions).
3. A record of those arrests is maintained in the files of the Dallas Police Department, which records are available to other law enforcement agencies upon their request (Frank Dyson's Answers to Requests for Admissions).
4. Copies of those records as maintained in the Dallas Police Department files are attached hereto as exhibits.
5. On February 22, 1972, Plaintiffs were convicted in corporation court No. 6 of the City of Dallas, Texas for violating said ordinance (Hugh Jones' Answers to Requests for Admissions).
6. A record of those convictions is maintained in the Records of the Corporation Courts which records are open to inspection by the public (Hugh Jones' Answers to Requests for Admissions).
7. The Dallas Police Department is continuing to enforce the ordinance in question (Frank Dyson's Answers to Requests for Admissions).

3C

CITY OF DALLAS
TEXAS
LEGAL DEPARTMENT

N. ALEX BICKLEY
CITY ATTORNEY

MUNICIPAL BUILDING
DALLAS, TEXAS 75201

12 MAY 1972

Mr. Walter W. Steele, Jr.
Attorney at Law
3315 Daniels
Dallas, Texas 75205

Re: ELLIS, ET AL., V. DYSON, ET AL.
Civil Action No. CA-3-5702-D
REQUEST FOR PRODUCTION OF DOCUMENTS
UNDER RULE 34, F.R.C.P.

Dear Mr. Steele:

In conformity with your Request For Production of Documents filed on March 27, 1972, I enclose herewith the following documents:

1. Police Department arrest report, Thomas E. Ellis
2. Police Department arrest report, Robert Dennis Love
3. Prisoners activity report, Thomas E. Ellis
4. Prisoners activity report, Robert Dennis Love
5. Booking Cards for Thomas E. Ellis and Robert Dennis Love
6. Alias ticket upon which outstanding warrant was in effect for Thomas E. Ellis on January 18, 1972.

This production of records complies with your above reference request.

Very truly yours,

Tom Thorpe

THOMAS B. THORPE
Assistant City Attorney

TBT/kf
Enclosure

cc: Joseph McElroy, Jr.
Clerk, United States District Court

37

POLICE DEPARTMENT
CITY OF DALLAS

ELLIS, THOMAS
11517 ROCKCREST
7000 PEMBERTON
W M 5-1-50 21 6' 185 Br. Br.
Public Roadway
J T CAREY 2448
DALLAS
412175042I
449909272
Loitering, Under Susp Circ Ticket
1-18-72 2am
7000 Pemberton
Car Comp
Acme
EASTFIELD COLLEGE
STUDENT
327 5TH
746 3215
Adult

Officer observed above susp and a Pickup Van C-in-22 driving and sitting in the area of 7000 Pemberton. Officer observed no burglary alarm 7008 Pemberton; this area has several new homes under construction and has had several theft of tools and bags. Susp lives in different area of town and time was 2am. Susp also found to have alias ticket.

TICKET 796830 DOCKET 252026 WARRANT 29963 Sec 17 Sec 1 Sec 2 Sec 3 Sec 4 Sec 5 Sec 6 Sec 7 Sec 8 Sec 9 Sec 10 Sec 11 Sec 12 Sec 13 Sec 14 Sec 15 Sec 16 Sec 17 Sec 18 Sec 19 Sec 20 Sec 21 Sec 22 Sec 23 Sec 24 Sec 25 Sec 26 Sec 27 Sec 28 Sec 29 Sec 30 Sec 31 Sec 32 Sec 33 Sec 34 Sec 35 Sec 36 Sec 37 Sec 38 Sec 39 Sec 40 Sec 41 Sec 42 Sec 43 Sec 44 Sec 45 Sec 46 Sec 47 Sec 48 Sec 49 Sec 50 Sec 51 Sec 52 Sec 53 Sec 54 Sec 55 Sec 56 Sec 57 Sec 58 Sec 59 Sec 60 Sec 61 Sec 62 Sec 63 Sec 64 Sec 65 Sec 66 Sec 67 Sec 68 Sec 69 Sec 70 Sec 71 Sec 72 Sec 73 Sec 74 Sec 75 Sec 76 Sec 77 Sec 78 Sec 79 Sec 80 Sec 81 Sec 82 Sec 83 Sec 84 Sec 85 Sec 86 Sec 87 Sec 88 Sec 89 Sec 90 Sec 91 Sec 92 Sec 93 Sec 94 Sec 95 Sec 96 Sec 97 Sec 98 Sec 99 Sec 100 Sec 101 Sec 102 Sec 103 Sec 104 Sec 105 Sec 106 Sec 107 Sec 108 Sec 109 Sec 110 Sec 111 Sec 112 Sec 113 Sec 114 Sec 115 Sec 116 Sec 117 Sec 118 Sec 119 Sec 120 Sec 121 Sec 122 Sec 123 Sec 124 Sec 125 Sec 126 Sec 127 Sec 128 Sec 129 Sec 130 Sec 131 Sec 132 Sec 133 Sec 134 Sec 135 Sec 136 Sec 137 Sec 138 Sec 139 Sec 140 Sec 141 Sec 142 Sec 143 Sec 144 Sec 145 Sec 146 Sec 147 Sec 148 Sec 149 Sec 150 Sec 151 Sec 152 Sec 153 Sec 154 Sec 155 Sec 156 Sec 157 Sec 158 Sec 159 Sec 160 Sec 161 Sec 162 Sec 163 Sec 164 Sec 165 Sec 166 Sec 167 Sec 168 Sec 169 Sec 170 Sec 171 Sec 172 Sec 173 Sec 174 Sec 175 Sec 176 Sec 177 Sec 178 Sec 179 Sec 180 Sec 181 Sec 182 Sec 183 Sec 184 Sec 185 Sec 186 Sec 187 Sec 188 Sec 189 Sec 190 Sec 191 Sec 192 Sec 193 Sec 194 Sec 195 Sec 196 Sec 197 Sec 198 Sec 199 Sec 200 Sec 201 Sec 202 Sec 203 Sec 204 Sec 205 Sec 206 Sec 207 Sec 208 Sec 209 Sec 210 Sec 211 Sec 212 Sec 213 Sec 214 Sec 215 Sec 216 Sec 217 Sec 218 Sec 219 Sec 220 Sec 221 Sec 222 Sec 223 Sec 224 Sec 225 Sec 226 Sec 227 Sec 228 Sec 229 Sec 230 Sec 231 Sec 232 Sec 233 Sec 234 Sec 235 Sec 236 Sec 237 Sec 238 Sec 239 Sec 240 Sec 241 Sec 242 Sec 243 Sec 244 Sec 245 Sec 246 Sec 247 Sec 248 Sec 249 Sec 250 Sec 251 Sec 252 Sec 253 Sec 254 Sec 255 Sec 256 Sec 257 Sec 258 Sec 259 Sec 260 Sec 261 Sec 262 Sec 263 Sec 264 Sec 265 Sec 266 Sec 267 Sec 268 Sec 269 Sec 270 Sec 271 Sec 272 Sec 273 Sec 274 Sec 275 Sec 276 Sec 277 Sec 278 Sec 279 Sec 280 Sec 281 Sec 282 Sec 283 Sec 284 Sec 285 Sec 286 Sec 287 Sec 288 Sec 289 Sec 290 Sec 291 Sec 292 Sec 293 Sec 294 Sec 295 Sec 296 Sec 297 Sec 298 Sec 299 Sec 300 Sec 301 Sec 302 Sec 303 Sec 304 Sec 305 Sec 306 Sec 307 Sec 308 Sec 309 Sec 310 Sec 311 Sec 312 Sec 313 Sec 314 Sec 315 Sec 316 Sec 317 Sec 318 Sec 319 Sec 320 Sec 321 Sec 322 Sec 323 Sec 324 Sec 325 Sec 326 Sec 327 Sec 328 Sec 329 Sec 330 Sec 331 Sec 332 Sec 333 Sec 334 Sec 335 Sec 336 Sec 337 Sec 338 Sec 339 Sec 340 Sec 341 Sec 342 Sec 343 Sec 344 Sec 345 Sec 346 Sec 347 Sec 348 Sec 349 Sec 350 Sec 351 Sec 352 Sec 353 Sec 354 Sec 355 Sec 356 Sec 357 Sec 358 Sec 359 Sec 360 Sec 361 Sec 362 Sec 363 Sec 364 Sec 365 Sec 366 Sec 367 Sec 368 Sec 369 Sec 370 Sec 371 Sec 372 Sec 373 Sec 374 Sec 375 Sec 376 Sec 377 Sec 378 Sec 379 Sec 380 Sec 381 Sec 382 Sec 383 Sec 384 Sec 385 Sec 386 Sec 387 Sec 388 Sec 389 Sec 390 Sec 391 Sec 392 Sec 393 Sec 394 Sec 395 Sec 396 Sec 397 Sec 398 Sec 399 Sec 400 Sec 401 Sec 402 Sec 403 Sec 404 Sec 405 Sec 406 Sec 407 Sec 408 Sec 409 Sec 410 Sec 411 Sec 412 Sec 413 Sec 414 Sec 415 Sec 416 Sec 417 Sec 418 Sec 419 Sec 420 Sec 421 Sec 422 Sec 423 Sec 424 Sec 425 Sec 426 Sec 427 Sec 428 Sec 429 Sec 430 Sec 431 Sec 432 Sec 433 Sec 434 Sec 435 Sec 436 Sec 437 Sec 438 Sec 439 Sec 440 Sec 441 Sec 442 Sec 443 Sec 444 Sec 445 Sec 446 Sec 447 Sec 448 Sec 449 Sec 450 Sec 451 Sec 452 Sec 453 Sec 454 Sec 455 Sec 456 Sec 457 Sec 458 Sec 459 Sec 460 Sec 461 Sec 462 Sec 463 Sec 464 Sec 465 Sec 466 Sec 467 Sec 468 Sec 469 Sec 470 Sec 471 Sec 472 Sec 473 Sec 474 Sec 475 Sec 476 Sec 477 Sec 478 Sec 479 Sec 480 Sec 481 Sec 482 Sec 483 Sec 484 Sec 485 Sec 486 Sec 487 Sec 488 Sec 489 Sec 490 Sec 491 Sec 492 Sec 493 Sec 494 Sec 495 Sec 496 Sec 497 Sec 498 Sec 499 Sec 500 Sec 501 Sec 502 Sec 503 Sec 504 Sec 505 Sec 506 Sec 507 Sec 508 Sec 509 Sec 510 Sec 511 Sec 512 Sec 513 Sec 514 Sec 515 Sec 516 Sec 517 Sec 518 Sec 519 Sec 520 Sec 521 Sec 522 Sec 523 Sec 524 Sec 525 Sec 526 Sec 527 Sec 528 Sec 529 Sec 530 Sec 531 Sec 532 Sec 533 Sec 534 Sec 535 Sec 536 Sec 537 Sec 538 Sec 539 Sec 540 Sec 541 Sec 542 Sec 543 Sec 544 Sec 545 Sec 546 Sec 547 Sec 548 Sec 549 Sec 550 Sec 551 Sec 552 Sec 553 Sec 554 Sec 555 Sec 556 Sec 557 Sec 558 Sec 559 Sec 560 Sec 561 Sec 562 Sec 563 Sec 564 Sec 565 Sec 566 Sec 567 Sec 568 Sec 569 Sec 570 Sec 571 Sec 572 Sec 573 Sec 574 Sec 575 Sec 576 Sec 577 Sec 578 Sec 579 Sec 580 Sec 581 Sec 582 Sec 583 Sec 584 Sec 585 Sec 586 Sec 587 Sec 588 Sec 589 Sec 590 Sec 591 Sec 592 Sec 593 Sec 594 Sec 595 Sec 596 Sec 597 Sec 598 Sec 599 Sec 600 Sec 601 Sec 602 Sec 603 Sec 604 Sec 605 Sec 606 Sec 607 Sec 608 Sec 609 Sec 610 Sec 611 Sec 612 Sec 613 Sec 614 Sec 615 Sec 616 Sec 617 Sec 618 Sec 619 Sec 620 Sec 621 Sec 622 Sec 623 Sec 624 Sec 625 Sec 626 Sec 627 Sec 628 Sec 629 Sec 630 Sec 631 Sec 632 Sec 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883 Sec 884 Sec 885 Sec 886 Sec 887 Sec 888 Sec 889 Sec 890 Sec 891 Sec 892 Sec 893 Sec 894 Sec 895 Sec 896 Sec 897 Sec 898 Sec 899 Sec 900 Sec 901 Sec 902 Sec 903 Sec 904 Sec 905 Sec 906 Sec 907 Sec 908 Sec 909 Sec 910 Sec 911 Sec 912 Sec 913 Sec 914 Sec 915 Sec 916 Sec 917 Sec 918 Sec 919 Sec 920 Sec 921 Sec 922 Sec 923 Sec 924 Sec 925 Sec 926 Sec 927 Sec 928 Sec 929 Sec 930 Sec 931 Sec 932 Sec 933 Sec 934 Sec 935 Sec 936 Sec 937 Sec 938 Sec 939 Sec 940 Sec 941 Sec 942 Sec 943 Sec 944 Sec 945 Sec 946 Sec 947 Sec 948 Sec 949 Sec 950 Sec 951 Sec 952 Sec 953 Sec 954 Sec 955 Sec 956 Sec 957 Sec 958 Sec 959 Sec 960 Sec 961 Sec 962 Sec 963 Sec 964 Sec 965 Sec 966 Sec 967 Sec 968 Sec 969 Sec 970 Sec 971 Sec 972 Sec 973 Sec 974 Sec 975 Sec 976 Sec 977 Sec 978 Sec 979 Sec 980 Sec 981 Sec 982 Sec 983 Sec 984 Sec 985 Sec 986 Sec 987 Sec 988 Sec 989 Sec 990 Sec 991 Sec 992 Sec 993 Sec 994 Sec 995 Sec 996 Sec 997 Sec 998 Sec 999 Sec 1000

J. Alonzo 227
1-18-72 2:40AM
CASH BOND # 157526 + 157527 CT 3
10am 1-29-72 70 + 5 CC
CB 151526 2250 1-18-72 2am Ct 3 1-29-72 INDEXED 10AM

(2)

ARREST REPORT — POLICE DEPARTMENT, CITY OF DALLAS

Date Occurred	253
Beat	NE
Location of Arrest / Address	7000 Pemberton
Premise Type	Public Roadway
Service Serial No.	33-7449-632
Selective Service No.	
Name	Love, Robert Dennis
Address	5225 Belmont
Race / Sex / D.O.B. / Age / Ht. / Wt. / Hair / Eyes / Marital	M / C / 12-3-49 / 22 / 5-9 / 135 / Black / Brown
Arresting Officer	J.T. Carey
Badge No.	2445
Place of Birth	Ohio
Social Security No.	32-48-9241
Charge	Loitering Under Sus. Circum.
How Arrest Made	Non Vio.
Date / Time	1-18-72 2 AM
Disposition	East Comd
Narcotic	
Weapon Described	None
Armed	
Investigating Officer – Badge No.	
Other Arresting Officer – Badge No.	
Alias or Nickname	None
Where Defendant Employed or School	SMU
Occupation	Student
Res. Phone	526-1598
Bus. Phone	
Lic. No. / State	OHIO
Year / Make / Body / Color	67 Ford 2dr Blue
Opr. Lic. No. / State	093562 Tex
Hold Placed on Vehicle/Towed To	
Property Placed in Property Room	
Father (Name)	Hall
Address / City / Res. Phone / Bus. Phone	
Mother (Maiden)	
Guardian or Next of Kin	
Complainant	
Witness	

18 Jul

Name of Parent/Guardian/Next of Kin Notified — Date/Time — Officer — Badge No.

Narrative:

Officer Answered a burglary alarm at 7008 Pemberton. Above defendant was seen sitting and driving in the area. This area has several new houses under construction and has had numerous theft of pipe and burglarys. The time was 2am and defendant lives in a different part of town. Defendant was with a Thomas E. Ellis who also arrested for loitering and also tickets

Officer — Badge No. — Transporting Officer — Badge No. — Booking Officer — Badge No.

1-11-72 2 AM

Transporting Officer — Badge No. — Searched By

Cash Bond # 151525 CT 3 10 AM

1-29-72 50.00 + 2.50 CC

CB 151525 $52.50 1-18-72 2 PM CT 3 INDEXED 1-29-72 10 AM

(1)

PRISONER'S ACTIVITY REPORT — POLICE DEPARTMENT, CITY OF DALLAS

Name (Last, First, Middle) — Address — City — Race — Sex — Age — S.S.N.

Ellis, Thomas — 11517 Rockcreek D — W M 21 5-1-50

Charge: Loitering Under Sus. Circ. Also Ticket

Arresting Officers: J.T. Carey 2445 — District Station: NE

Condition — Drunk — Sick — Injured — Normal: X — Medical Treatment — Location Where Treated

Location of Arrest: 7000 Pemberton — Date of Arrest: 1-18-72 — Time of Arrest: 2AM

Car Impounded — Location — Property in Property Room: X

Below Filled In By Jail Personnel — Date Received — Time Received — Jailer — Cell No.

Prisoner Fingerprinted — Photographed — Change Charged To:

Telephone Record — Date / Time / Contact / Yes No / Declined / Use — Date / Time / Contact / Yes No / Declined / Use

Date	Time Out	Time In	Reason for Movement of Prisoner:	Investigator	Jailer

Prisoner's Personal Property: Cash — Purse — Watch — Knife — Keys — Glasses — Ring — Pen — Pencil — Lighter — Package — Check — Beer — Wine — Whiskey — Miscellaneous — Searched By — Jailer on Desk — Property Rel. By — Property Rec. By

Released By: J.R. Schreck

Time: 2 5m AM — Date: 1-15-72

How: C.B. — No. of Meals

Date Served

Jailer's Comments

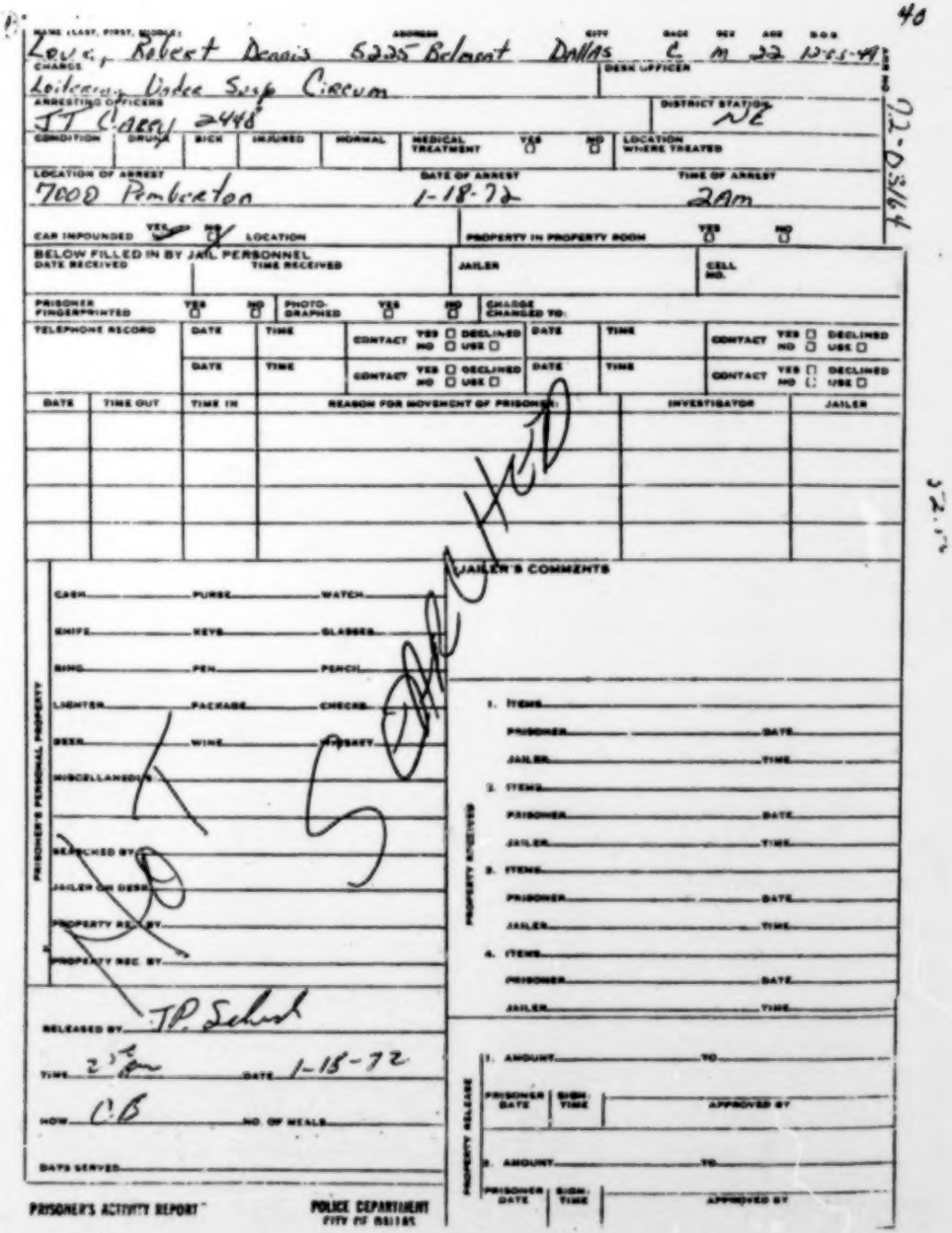
1. Items — Prisoner — Date — Jailer — Time
2. Items — Prisoner — Date — Jailer — Time
3. Items — Prisoner — Date — Jailer — Time
4. Items — Prisoner — Date — Jailer — Time

Property Release: 1. Amount — To — Prisoner Date — Sign Time — Approved By

2. Amount — To — Prisoner Date — Sign Time — Approved By

Prisoner's Activity Report — Form 64-1300

Police Department, City of Dallas



40

Love, Robert Dennis 5225 Belmont Dallas C M 22 12-3-49

CHARGE: Loitering Under Susp Circum

DESK OFFICER:

ARRESTING OFFICERS: JT Carey 2448

DISTRICT STATION: NW

CONDITION | DRUGS | SICK | INJURED | NORMAL | MEDICAL TREATMENT YES NO | LOCATION WHERE TREATED

LOCATION OF ARREST: 7000 Pemberton

DATE OF ARREST: 1-18-72

TIME OF ARREST: 2Am

CAR IMPOUNDED YES NO X LOCATION

PROPERTY IN PROPERTY ROOM YES NO

BELOW FILLED IN BY JAIL PERSONNEL
DATE RECEIVED | TIME RECEIVED | JAILER | CELL NO.

PRISONER FINGERPRINTED YES NO | PHOTOGRAPHED YES NO | CHARGE CHANGED TO:

TELEPHONE RECORD

DATE	TIME	CONTACT YES NO DECLINED USE	DATE	TIME	CONTACT YES NO DECLINED USE
DATE	TIME	CONTACT YES NO DECLINED USE	DATE	TIME	CONTACT YES NO DECLINED USE

DATE	TIME OUT	TIME IN	REASON FOR MOVEMENT OF PRISONER	INVESTIGATOR	JAILER

PRISONER'S PERSONAL PROPERTY

CASH PURSE WATCH
KNIFE KEYS GLASSES
RING PEN PENCIL
LIGHTER PACKAGE CHECKS
BEER WINE WHISKEY
MISCELLANEOUS
RECEIVED BY
JAILER ON DESK
PROPERTY RET BY
PROPERTY REC BY

JAILER'S COMMENTS

PROPERTY RELEASED
1. ITEMS
PRISONER DATE
JAILER TIME
2. ITEMS
PRISONER DATE
JAILER TIME
3. ITEMS
PRISONER DATE
JAILER TIME
4. ITEMS
PRISONER DATE
JAILER TIME

RELEASED BY: TP Schuh

TIME: 2 Pm DATE: 1-18-72

HOW: CB NO. OF MEALS

DAYS SERVED

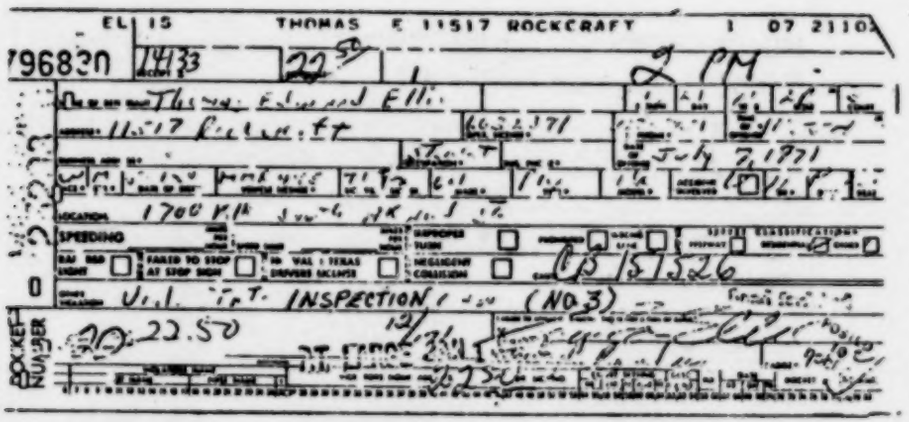
PROPERTY RELEASE
1. AMOUNT TO
PRISONER DATE | SIGN TIME | APPROVED BY
2. AMOUNT TO
PRISONER DATE | SIGN TIME | APPROVED BY

PRISONER'S ACTIVITY REPORT

POLICE DEPARTMENT
CITY OF DALLAS

Love, Robert Dennis	72-03164 nkb	JC 5136
5225 Belmont	cn22	
SMU	12-3-49	
7000 Pemberton	1-18 2am	52.50 CB151525
JT Carey 2448		12 PM
Loitering(under susp circ)		
cash bond		12.50 pd 243757
		2-24-72

Ellis, Thomas E	72-03163 nkb	JC 5078
11517 Rochcraft	wz21	
Westfield College	5-1-50	
7000 Pemberton	1-18 2am	52.50 CB151527
JT Carey 2448		12 PM
Loitering (under susp circ)		
cash bond		12.50 pd 243756
		2-24-72



Affidavit of Robert D. Love

STATE OF TEXAS,
COUNTY OF DALLAS:

Before me, the undersigned authority, on this day personally appeared Robert D. Love, who being first duly sworn, did on his oath depose and say as follows:

My name is Robert D. Love. I am a resident of the City of Dallas, Texas. I am over the age of twenty-one years, and I am otherwise competent to make this Affidavit.

I was born on December 3, 1949. I am a member of the Negro race. I reside at 5225 Belmont, Apartment 136 in Dallas. I am a graduate student in the School of Music at Southern Methodist University in Dallas.

This Affidavit relates to my arrest on January 18th, 1972, for "loitering". At the time of that arrest, I was accompanied by a friend, Tom E. Ellis, also a resident of Dallas, Texas, who is a member of the Caucasian race.

Between the hours of 11:30 o'clock p.m. and 12:30 o'clock a.m., on the night of January 17-18, 1972, my friend, Tom Ellis, and I left the home of mutual friends who live in the 5700 block of Goodwin Street, also in Dallas. Earlier in the day on January 17th, 1972, I had accompanied these mutual friends as they looked at apartments and houses in the area east of Hillcrest Avenue, in North Dallas. This was near the location where I was subsequently arrested.

Upon leaving the home of our friends, about midnight, I decided to show the apartments I had seen earlier in the day to Tom Ellis, who had not been with me earlier. On the way to the neighborhood where the apartments and homes are located, we stopped at Kip's Restaurant at the corner of Greenville and Mockingbird, for something to eat.

I then drove, with Tom Ellis, to the area east of Hillcrest Avenue, and turned into the street where I had been earlier in the day with my friends. I do not recall the name of the street now, but I did recognize it that night. I was driving slowly, about 10-15 miles per hour, so that Tom and I could look at the various models and styles of homes, and talk about each.

About this time, after we had been in the area for perhaps five minutes, I noticed what appeared to be a police car following us. This car followed us all around the area while I continued to show the various homes and apartments to Tom. Upon turning a corner, however, I saw that the car following us was not a Dallas Police Department vehicle, but a "Neighborhood Patrol" car.

As we started down another street, I saw a number of police cars and Neighborhood Patrol cars at the end of the block. One of the police cars was displaying flashing red lights. The end of the street was a "T" intersection, and we were approaching the cross-piece, and obviously had to turn either left or right. I turned left at the intersection, with various police and Neighborhood Patrol cars all around my car. Not knowing what was happening, and being unsettled by the car which had been following us, I decided that the best course of action was to just stop my car and wait for a police officer to tell us what to do.

One of the Neighborhood Patrol officers and a Dallas Police Department officer approached our vehicle and began to ask us questions. I think the Dallas Police officer's name was Carey. We were asked for identification; I gave my driver's license to the officer and Tom handed his school I-D to him. The officer then asked us more questions.

The Dallas Police officer then went to his car and I heard him give our names on the radio. About five minutes later,

he came back to my car and told Tom Ellis that he would be arrested for an "alias" ticket, a traffic ticket which he allegedly had not paid. The same officer, Carey, then told us that there had been an attempted burglary in the area where we were, and asked if we knew anything about it. We both said we did not, and also told him that a Neighborhood Patrol car had been following us almost since we arrived in the vicinity.

The Dallas Police officer then asked both Tom and myself to get out of the car. We were frisked and the car was searched. The Dallas policeman told Tom to go and sit in the police car. He then told me to open the trunk of my car, which I did. He searched the trunk, but only found some rope. He turned to me, holding the rope in his hand, and asked: "Is this what you use to hang police officers?" The officer then told me to sit in my car. Some time later, another Dallas policeman arrived. He wore three inverted "V" stripes on his sleeve. He was a sergeant.

The sergeant and Officer Carey talked for awhile, then Carey came to my car and told me to move over. While Officer Carey was driving my car to the Northeast Police Substation, we talked. I asked if I was under arrest, and he said yes, for "loitering". He said Tom would be charged with that offense, also.

At the Northeast Police Substation, I was booked and fingerprinted. We posted cash bond and as we were leaving, the sergeant told us both that if he ever saw us in that part of town again, he would "make it much worse" for us next time. By the time I arrived home, it was around 5 o'clock a.m. on the morning of January 18th, 1972.

Since my arrest for loitering, I have been very nervous about being out in public places, especially at night and in areas of town where there are numerous police officers. I

worry about being seen in public with members of the Caucasian race. In some instances, I have foregone activities in public places because of my fear of being arrested again for loitering. At other times, I have gone ahead and been active in public, but not without a gnawing fear of possible arrest. Nevertheless, I still intend to be out in public in Dallas, Texas in the future. I intend to travel freely and without restraint on public streets and in public areas, despite my uncertainty as to the scope and elements of the offense called and charged as "loitering". In doing so, I am sure that I risk possible arrest for that offense.

ROBERT D. LOVE

[Jurat omitted in printing]

Respondents' Opposition to Petitioners' Application for Summary Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

[CAPTION OMITTED]

To the Honorable Judge of Said Court:

NOW COMES, the Defendants herein, in the above entitled and numbered cause, and in reply and in opposition to the Plaintiffs' Motion for Summary Judgment herein, would respectfully show unto the court the following, to-wit:

I.

The Plaintiffs have failed by their complaint, and Motion for Summary Judgment to show how the Defendants have acted in bad faith or committed any act of harassment against the Plaintiffs, TOM E. ELLIS and ROBERT D. LOVE. These necessary factual assertions have not been raised by the Plaintiffs in their complaint, and upon this basis alone, the Plaintiffs are not entitled to a favorable judgment of this Honorable Court.

II.

The Defendants would show the court that there are genuine issues of material facts to be tried in this cause. The

Plaintiffs by their complaint and brief did recognize the need to make the factual assertion that a future state prosecution of the Plaintiffs is threatened under Ordinance 31-60. The Plaintiffs even went so far as to indicate by their own brief that this Court is permitted to abstain from a trial of this cause should it find that the Plaintiffs had NOT *alleged* and *proved* a genuine threat of a future state prosecution under the subject ordinance. The Defendants herein have persistently maintained that a future prosecution of the Plaintiffs, absent any allegations and proof of a bad faith harassment by Defendants, would be highly speculative and conjectural. Should this Court decide *not* to abstain from this cause, the question of whether the Plaintiffs face a genuine threat of future prosecution under 31-60 would then become a material issue to be determined by the truth-seeking procedures of trial.

III.

Defendants assert that from the pleadings, affidavits, and papers on file herein, there are genuine issues of material fact to be determined in this cause. There are genuine issues of material facts to be tried herein that can be reached only by a trial of this case upon its merits, particularly but not exclusively, in connection with the Defendants' plea that Ordinance 31-60 is not facially un-Constitutional; that the Plaintiffs have not been subjected to a bad faith harassment by the Defendants herein; that the Plaintiffs have not been irreparable harmed.

WHEREFORE, PREMISES CONSIDERED, the Defendants respectfully pray that the Plaintiffs' Motion for Summary Judg-

ment be in all things overruled, and for all other proper orders of this honorable court.

Respectfully submitted,

N. ALEX BICKLEY
THOMAS B. THORPE
JOSEPH G. WERNER
DOUGLAS H. CONNER
Attorneys for Defendants
501 Municipal Building
Dallas, Texas 75201
748-9711, ext. 294

By DOUGLAS H. CONNER

[Certificate of Service omitted in printing]

Respondents' Motion to Dismiss

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

[CAPTION OMITTED]

To the Honorable Judge of said Court:

COMES NOW FRANK M. DYSON, N. ALEX BICKLEY, SCOTT MCDONALD, HUGH JONES and WES WISE, Defendants in the above numbered and styled cause, and move the Court to dismiss this action on the following grounds:

I.

Plaintiffs' Complaint fails to state a cause of action over which this Court has jurisdiction.

II.

Plaintiffs' Complaint fails to state a claim upon which relief can be granted against these Defendants.

III.

Defendants say further that the abstention doctrine is applicable to Plaintiffs' Complaint and asks the Court to exercise its discretion and refuse to take jurisdiction of Plaintiffs' Complaint and grant the relief sought therein.

WHEREFORE, PREMISES CONSIDERED, the Defendants pray that Plaintiffs' Complaint be dismissed for the reasons hereinabove stated and that, in the event this Motion to Dismiss is denied, the Defendants be given ten (10) days after such ruling in which to file responsive pleadings to Plaintiffs' Complaint.

Respectfully submitted,

N. ALEX BICKLEY
THOMAS B. THORPE
JOSEPH G. WERNER
DOUGLAS H. CONNER

By THOMAS B. THORPE
Attorneys for Defendants
501 Municipal Building
Dallas, Texas 75201
748-9711, ext. 294

[Certificate of Service omitted in printing]

Petitioners' Supplemental Requests for Admissions and Interrogatories

[CAPTION OMITTED]

To: MR. THOMAS B. THORPE, Esquire
Assistant City Attorney
City of Dallas
Dallas, Texas

In light of the time which has elapsed since this case was filed on April 12, 1972, plaintiff alleges that a relevant issue is the rate at which arrests are made in the City of Dallas for violation of Section 31-60 of the Revised Code of the City of Dallas, better known as the Loitering Ordinance. Plaintiff further alleges that this arrest rate will likewise be relevant should it become necessary to seek mandamus in order to obtain a judgment in this case. Therefore, plaintiff requests that the defendant, by officer or agent, answer under oath in accordance with Rule 33 of the Federal Rules of Civil Procedure the following interrogatories:

1. How many people have been arrested by officers of the Dallas Police Department for loitering as defined in Section 31-60 of the Revised Code of the City of Dallas between the dates of April 12, 1972 (the date this case was filed) and July 17, 1972 (the date motion for summary judgment was filed in this case)?

2. How many people have been arrested by officers of the Dallas Police Department for loitering as defined in

Section 31-60 of the Revised Code of the City of Dallas between the dates of July 17, 1972 (the date motion for summary judgment was filed in this case) and November 10, 1972 (the date this application is being written).

Plaintiff requests that the defendant admit the truth of the following fact:

It is currently the policy of the Dallas Police Department to make arrests for violation of Section 31-60 of the Dallas City Code—the Loitering Ordinance.

WALTER W. STEELE, JR.
Attorney for Plaintiffs
3315 Daniels
Dallas, Texas 75202
Phone: 692-2599

November 10, 1972

Opinion and Order of Dismissal

[CAPTION OMITTED]

Tom E. Ellis and Robert D. Love, plaintiffs, filed this suit for redress of rights secured to them by the First and Fourteenth Amendments to the Constitution of the United States. This suit was instituted against certain officials of the City of Dallas, Texas, under 42 U. S. C. §1983.[1] Plaintiffs attack the constitutionality of an ordinance of the City of Dallas which prohibits loitering. They seek declaratory and injunctive relief.

The defendants moved the court to dismiss the case for lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted. Alternatively they moved the court in its discretion not take jurisdiction of this case by reason of the doctrine of abstention. The court overruled the defendants' motion to dismiss and carried the motion for abstention. In their answer defendants reurged that the complaint be dismissed. Subsequently, plaintiffs filed a motion for summary judgment.

The court has heard the arguments and considered the briefs of the parties in connection with the motion for summary judgment filed by plaintiffs and the motion for abstention filed by defendants. The court has also reconsidered the defendants' motion to dismiss which was previously denied. The court concludes that in the light of

[1] The city officials named as defendants are: Frank Dyson, chief of police; N. Alex Bickley, city attorney; Scott McDonald, city manager; Hugh Jones, clerk of the corporation court; Wes Wise, mayor.

recent decisions of the Fifth Circuit hereinafter discussed the motion to dismiss should be granted.

In dismissing this case the court does not reach plaintiffs' motion for summary judgment or defendants' motion for abstention.

The complaint states that plaintiffs were arrested in the City of Dallas on January 18, 1972, and charged with violating an ordinance against loitering.[2] Plaintiffs applied to the Texas Court of Criminal Appeals for a writ of prohibition to prevent their prosecution under this ordinance. The gravamen of the application was the constitutionality of the ordinance under which plaintiffs were charged. This application was denied and the charges pending against the plaintiffs were set for trial in the corporation court of the City of Dallas. Plaintiffs moved to dismiss the charges on the ground that the ordinance was unconstitutional. This motion was denied and plaintiffs entered pleas of nolo contendere and were convicted.

In their complaint plaintiffs contend that this anti-loitering ordinance is unconstitutional "on its face" because it (1) is vague and overly broad, providing no discernible standards of conduct, and is violative of the due process clause; (2) is violative of the equal protection clause in that it depends upon the alarm or concern of a police officer

[2] The ordinance in dispute is Section 31-60 of the revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas. It provides in part "that no person shall loiter in, on or about any public or private place when his presence is accompanied by activity or is under circumstances affording probable cause for alarm or concern for the safety and well-being of persons or for the security of property in the surrounding area." It also defines loitering as including the activities of "walking about aimlessly without apparent purpose; lingering; hanging around; lagging behind; idle spending of time; delaying; sauntering and moving slowly about, where such conduct is not due to physical defects or conditions."

as to whether the ordinance is being violated and this may vary from person to person; (3) prohibits conduct which is beyond the power of a governmental authority to make illegal; and, (4) has a "chilling effect" upon the free exercise of the rights of freedom of association and assembly and freedom of speech guaranteed by the First Amendment and has a "chilling effect" upon the fundamental right of freedom of movement. Plaintiffs do not allege any bad faith prosecutions, harassment or other unusual conduct, or threat of such in the future, by any of the defendants that has caused or will cause them to suffer irreparable injury and harm unless the relief prayed for is granted.[3]

For the purpose of ruling on defendants' motion to dismiss this court has assumed as true every factual allegation in plaintiffs' complaint and also assumes that the City of Dallas will continue to enforce the ordinance and this may subject plaintiffs to future arrest and prosecution under the ordinance.

Since plaintiffs do not allege that there are pending criminal proceedings against them, this court is faced with the issue as to the propriety of granting federal declaratory and injunctive relief against possible future criminal prosecutions under an ordinance alleged to be unconstitutional on its face when there are no allegations in the complaint of bad faith prosecutions, harassment or other unusual circumstances which would cause plaintiffs to

[3] In addition to asking this court to declare this ordinance unconstitutional, plaintiffs also ask the court to order all references to the arrests of the plaintiffs be "expunged" from police, FBI and court records and declare that if plaintiffs are ever asked if they have been arrested or convicted, they shall be entitled to answer in the negative insofar as the arrests and convictions arise from enforcement of this ordinance.

suffer irreparable injury and harm through the enforcement of the ordinance.

In *Younger* v. *Harris*, 401 U.S. 1 (1971), the Supreme Court laid to rest any question as to what was required for federal judicial relief in those instances where there was pending criminal prosecution by holding that such relief could not be granted except under extraordinary circumstances where the danger of irreparable injury was great and immediate. 401 U.S. at 45. The Court went on to hold that the existence of a "chilling effect" on First Amendment rights would not alone constitute a sufficient basis for prohibiting pending state action. However, the propriety of granting federal relief when no state criminal proceedings are pending was expressly reserved by the Supreme Court when it decided *Younger's* sibling *Samuels* v. *Mackle*, 401 U.S. 66 (1971). However, the Fifth Circuit in recent decisions has responded to this very issue.

In *Becker* v. *Thompson*, 459 F.2d 919 (5th Cir. 1972) the court held that *Younger* principles applicable to pending state criminal prosecutions are also applicable in cases seeking federal equitable relief from threatened state criminal prosecution. Later decisions of the Circuit have followed this holding. *Reed* v. *Giarrusso*, 462 F.2d 706 (5th Cir. 1972).[4] *Milner* v. *Burson*, No. 71-2853 (5th Cir., December 6, 1972). The complaint in *Reed* alleged "harassment and unlawful arrest . . . done in utter bad faith." The court noted that "the complaint . . . makes allegations

[4] In *Reed* the court was initially concerned with the standing of the plaintiffs to bring the suit since this was the basis on which the district court had dismissed the complaint. The court concluded, as this court does in the case of *sub judice*, that plaintiffs did have standing to sue since they had been arrested and alleged that they will continue to engage in the same conduct which brought about their arrests and that they fear future arrests and prosecutions.

which if proved, would entitle them to relief even under the stringent standards of *Younger.*" *Reed,* 462 F.2d at 706, 711.

A reading of these cases leads the court to conclude that before federal declaratory or injunctive relief is available in the absence of a pending criminal prosecution there must be allegations of threatened bad faith prosecution, harassment or other unusual circumstances. In addition there must be an allegation of irreparable injury and harm to one seeking federal relief.

The only allegations in the complaint in this case which approach irreparable injury are the statements that the ordinance will have a "chilling effect" on the plaintiffs' First Amendment rights and their fundamental right of freedom of movement. The fact that the enforcement of this ordinance by the defendants would have such an effect is not enough to establish irreparable harm and injury. *Younger,* 401 U.S. at 51.

The court further notes that the plaintiffs have not alleged that they exhausted the state appeal processes after they were convicted in the corporation court. The plaintiffs could have appealed and obtained a trial de novo in the Dallas County, Criminal Court of Appeals. *Tex. Code Crim. Proc. Ann.* art. 44.17 (1965). Had they been convicted and fined in excess of $100.00, they could have appealed to the Texas Court of Criminal Appeals, the highest criminal appellate court in the State of Texas. *Tex. Code Crim. Proc. Ann.* art. 4.03 (1965). Had they been convicted and fined less than $100.00, plaintiffs would have exhausted their state remedies at that point.[5]

[5] At this stage plaintiffs had the right to appeal directly to the Supreme Court of the United States. 28 U.S.C. §1257.

For the reasons set forth above it is the opinion of the court that the defendants' motion to dismiss should be granted.

It is so ORDERED and this case is dismissed with all costs taxed against plaintiffs.

Dated this 13th day of December, 1972.

R. Wm. HILL
United States District Judge

Respondents' Answers to Request for Admission and Interrogatories

[CAPTION OMITTED]

COMES NOW the undersigned attorney for Defendants herein and makes the following responses to Request for Interrogatories and Admission previously filed herein on November 10, 1972, by Plaintiffs:

1. During the entire months of April, May, June and July, 1972, an average of 2.47 persons were arrested per day for the offense of loitering by officers of the Dallas Police Department.

2. During the entire months of August, September and October, 1972, an average of 2.25 persons were arrested per day for the offense of loitering by officers of the Dallas Police Department.

Request for Admission—ADMITTED.

This is to certify to the best of my knowledge and belief that the above and foregoing answers are true and correct.

THOMAS B. THORPE
Attorney for Defendants
Attorney for Defendants

[Verification omitted in printing]

Notice of Appeal to the United States Court of Appeals for the Fifth Circuit

[CAPTION OMITTED]

Notice is hereby given that TOM E. ELLIS and ROBERT D. LOVE, Plaintiffs, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Order of Dismissal entered in this action on December 13, 1972.

Respectfully submitted,

WALTER W. STEELE, JR.
Attorney for Plaintiffs
3315 Daniels
Dallas, Texas 75205
Phone: 692-2599

Order of Summary Affirmance

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 73-1190

Summary Calendar*

TOM E. ELLIS and ROBERT D. LOVE,

Plaintiffs-Appellants,

—versus—

FRANK M. DYSON, Individually and in his capacity as Chief of Police of the City of Dallas, Texas, *et al.*, etc.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

(April 16, 1973)

Before BELL, GODBOLD and INGRAHAM, *Circuit Judges.*

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1] See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

Supreme Court, U. S.
FILED
AUG 14 1973
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-130

TOM E. ELLIS and ROBERT D. LOVE,

Petitioners,

v.

FRANK DYSON, et al.,

Respondents.

On Petition For a Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. Petitioners' action is within the class of cases controlled by the Supreme Court decision, Younger v. Harris, and even assuming the unconstitutionality of the City of Dallas' loitering ordinance on its face, the trial court acted properly in dismissing the Petitioner's Complaint since they did not allege nor did they show bad faith harassment, or other unusual circumstances that would entitle them to federal injunctive and declaratory relief. 5

II. Petitioners did not use diligence in presenting their constitutional arguments to the state courts when they voluntarily waived their right to a trial de novo, and made no effort to appeal their plea of nolo contendere in the City of Dallas' Municipal Court. ... 9

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In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-130

TOM E. ELLIS and ROBERT D. LOVE,
Petitioners,

v.

FRANK DYSON, et al.,
Respondents.

On Petition For a Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Opinion of the District Court for the Northern District of Texas is set out in Plaintiff's Writ of Certiorari, Appendix 2a. The per curiam decision of the Court of Appeals for the Fifth Circuit is set forth in Plaintiff's Writ of Certiorari, Appendix 1a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 16, 1973. The Petition

for Writ of Certiorari was received and docketed in the Supreme Court of the United States on July 16, 1973. Jurisdiction is alleged by the Petitioners under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED BY PETITIONERS

1. Must petitioners show bad faith, harassment or other extraordinary circumstances required by *Younger v. Harris*, 401 U.S. 37 (1971), when they seek federal declaratory relief from a facially unconstitutional ordinance, and when they have been once convicted under such ordinance and no municipal or state proceedings are pending?

2. Under the circumstances described in Question No. 1, and when in addition the petitioners, prior to conviction, have sought a writ of prohibition of the State's highest court, and the writ has been denied, must petitioners exhaust other state remedies prior to obtaining federal declaratory relief?

STATUTORY PROVISIONS INVOLVED

Seciton 31-60 of the 1960 Revised Code of Civil and Criminal Ordinances of Dallas, Texas, as amended by Ordinance No. 12991 is set out in Petitioners' Appendix, Pages 8a through 10a.

Article 4.14 of the Texas Code of Criminal Procedure:

> The corporation court in each incorporated city, town or village of this State shall have jurisdiction within the corporate limits in all criminal cases arising under the ordinances of such city, town or village, and shall have concurrent jurisdiction with any justice of the peace in any precinct in which said city, town or village is situated in all criminal cases arising under the criminal laws of this State, in which the punishment is by fine only,

> and where the maximum of such fine may not exceed $200.00, and arising within such corporate city limits.

Article 44.17 of the Texas Code of Criminal Procedure:

> In all appeals from justice and corporation courts to the county court, the trial shall be de novo in the trial in the county court, the same as if the prosecution had been originally commenced in that court.

STATEMENT OF THE CASE

The Petitioners, Tom E. Ellis and Robert D. Love, brought this action against various named officials of the City of Dallas under Title 42, United States Code, Section 1983. The Petitioners attacked Section 31-60 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas, as amended, as being unconstitutional on its face. Tom E. Ellis and Robert D. Love did not allege that they had any pending criminal proceedings against them but seek federal declaratory and injunctive relief against possible future prosecution under the City of Dallas' Loitering Ordinance, Section 31-60 of the Dallas City Code. The Petitioners made no allegations in their complaint of bad faith prosecution by any named or unnamed City of Dallas officials. The District Court after considering the pleadings, reading the briefs, and hearing arguments of counsel, found no allegations of bad faith prosecution, harassment or other unusual circumstances which would cause the Petitioner to suffer irreparable injury and harm through the enforcement of the subject ordinance. For the above reasons and those reasons more extensively set forth in its written opinion, the District Court on December 13, 1972, granted the Defendants-Respondents' Motion for Dismissal.

STATEMENT OF FACTS

The Petitioners' Complaint in the trial court alleges that they were arrested in the City of Dallas on January 18, 1972, and charged with violating Section 31-60, Revised Code of Civil ad Criminal Ordinances of the City of Dallas (App. 3).* Petitioners applied to the Texas Court of Criminal Appeals for a writ of prohibition to prevent their prosecution under this Ordinance. On February 21, 1972, the Texas Court of Criminal Appeals denied the Petitioners' application for writ of prohibition without written opinion (App. 6). In municipal court the Petitioners allege that they renewed their objections to the jurisdiction of that court on the ground that the ordinance which they were charged with violating was unconstitutional (App. 6). The motion was denied and the Petitioners entered pleas of nolo contendere and were convicted. The municipal court records indicate that both Petitioners paid $12.50 each ($10.00 fine plus $2.50 court cost) (App. 41).

The Petitioners never asserted in their Complaint the inadequacy of the state remedies nor did they raise this argument on appeal to the Fifth Circuit. The Petitioners are now raising for the first time in the federal courts, their argument that the Dallas County Court of Criminal Appeals would not reach their constitutional questions. The affidavits referred to on Pages 4, 5, and 13 of Petitioners' Brief were filed in the Texas Court of Criminal Appeals. The Petitioners never controverted or challenged in the federal court the Defendants-Respondents' affirmative allegation that Texas laws provide

* The designation "App." refers to the appendix filed in the United States Court of Appeals for the Fifth Circuit in this case.

an adequate remedy for any person charged with a violation of Ordinance 31-60. The affidavits referred to in Pages 4, 5, and 13 of Petitioners' Brief were never made an exhibit or part of the Petitioners' Complaint.

Although a trial de novo to the county court is sanctioned by Article 44.17, Code of Criminal Procedure, State of Texas, the Petitioners made no further effort to reurge the constitutionality of the subject ordinance in the state courts (App. 54). The Petitioners alleged that they exercised "reasonable diligence" in raising the constitutionality of this ordinance in the state court (App. 6, par. 6). However, the Plaintiffs-Petitioners never alleged that they exhausted the state appeal processes after they pled "nolo contendere" in municipal court nor did they ever obtain a trial de novo in the Dallas County Criminal Court of Appeals (App. 54).

ARGUMENT AND AUTHORITIES

I.

PETITIONERS' ACTION IS WITHIN THE CLASS OF CASES CONTROLLED BY THE SUPREME COURT DECISION, YOUNGER v. HARRIS, AND EVEN ASSUMING THE UNCONSTITUTIONALITY OF THE CITY OF DALLAS' LOITERING ORDINANCE ON ITS FACE, THE TRIAL COURT ACTED PROPERLY IN DISMISSING THE PETITIONERS' COMPLAINT SINCE THEY DID NOT ALLEGE NOR DID THEY SHOW BAD FAITH HARASSMENT, OR OTHER UNUSUAL CIRCUMSTANCES THAT WOULD ENTITLE THEM TO FEDERAL INJUNCTIVE AND DECLARATORY RELIEF.

Petitioners each have been once arrested and once convicted for having violated the City of Dallas loitering ordinance.

Petitioners brought this suit seeking both declaratory and injunctive relief from possible future criminal prosecution under this ordinance. The trial court dismissed the Petitioners' Complaint in that it found that the Plaintiffs-Petitioners had made no allegations of bad faith prosecution, harassment, or shown other unusual circumstances which would cause the Petitioners to suffer irreparable injury and harm from the continued enforcement of Section 31-60 of the Dallas City Code.

Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed. 2d 669 (1971), and its companion case, *Samuels v. Mackell,* 401 U.S. 66, 91 S. Ct. 764, 27 L.Ed. 2d 688 (1971), established that federal intervention * * * by way of injunctive or declaratory relief, cannot be granted except under extraordinary circumstances where the danger of irreparable injury is great and immediate. 27 L.Ed. 2d at 676. The Supreme Court in *Younger* held that the existence of a "chilling effect" on First Amendment Rights would not by itself justify federal intervention. 27 L.Ed. 2d at 679.

In the absence of showing that an "irreparable injury" will be suffered, it is improper for a federal district court to grant declaratory relief from future prosecution under state statute or city ordinance on federal constitutional grounds. *Samuels v. Mackell,* supra, *Younger v. Harris,* supra.

Even irreparable injury from future prosecution is insufficient unless "both great and immediate," 27 L.Ed. 2d at 676. The Petitioners have failed to show by their pleadings, argument, or allegations any immediate irreparable injury or harm. The Supreme Court stated that "only in cases of proven harass-

ment or prosecution undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in cases * * * where irreparable injury can be shown is federal injunctive relief in state prosecutions appropriate," *Perez v. Ledesma,* 401 U.S. 87, 27 L.Ed. 2d 701, 91 S. Ct. 674 (1971); *Younger v. Harris,* supra; *Ex Parte Young,* 209 U.S. 123, 52 L.Ed. 714, 28 S. Ct. 441 (1907).

There is nothing in the record before this Court to suggest that any of the City officials who are Respondents herein undertook the complained of prosecutions other than in a good faith attempt to enforce the state's criminal laws. Nothing in the record asserts or shows that any of the named City of Dallas officials selectively chose to enforce its loitering ordinance against only "long-haired highway travelers," as indicated in *Lewis v. Kugler,* 446 F. 2d 1343, 1345 (3 Cir., 1973), or against any other specific racial, social, or ethnic group or class of persons.

The Petitioners contend that the trial court should not have invoked the *Younger* doctrine because they assert that they challenge the City of Dallas' ordinance as being unconstitutional on its face. Contrary to what is asserted by the Petitioners, *Younger* does address itself to the situation wherein a state statute is attacked as being facially unconstitutional. The Supreme Court stated with respect to such an attack, "the possible unconstitutionality of a statute (on its face) does not in itself justify an injunction against good-faith attempts to enforce it, and * * * Harris has failed to make any showing of bad faith, harassment, or any other unusual circum-

stances that would call for equitable relief." 27 L. Ed. 2d at 681.

The Supreme Court in its recent decision, *Jane Roe, et al. v. Henry Wade,* 410 U.S. 113 (1973), again stated what is required of a plaintiff before he can bring an action to declare an ordinance or state statute unconstitutional. The same principles articulated in *Younger,* and its companion cases were respected when Dr. Hallford's complaint was dismissed. Although a plaintiff alleged that the Texas abortion statutes were facially unconstitutional, the court found that Dr. Hallford's status as a "potential future defendant," was indisinguishable from the situation that had been previously considered in *Samuels v. Mackell,* supra.

The Fifth Circuit has had on recent occasions several opportunities to determine the very issue brought on this appeal. In *Becker v. Thompson,* 459 F 2d 919 (5 Cir. 1972), the Court held the *Younger* principles applicable to pending state criminal prosecutions are also applicable in cases seeking federal equitable relief from threatened criminal prosecution. Later decisions of the Fifth Circuit have followed this holding: *Reed v. Giarusso,* 462 F. 2d 706 (5 Cir. 1972), *Hunt v. Rodriguez,* 462 F. 2d 659 (5 Cir. 1972); *Milner v. Burson,* 470 F. 2d 870 (5 Cir. 1972); *Community Action Group v. City of Columbus,* 473 F. 2d 966 (5 Cir. 1973). The Fifth Circuit has just determined that it would have an en banc hearing of *Jones v. Wade,* Civil Action No. 72-1481 (5 Cir., May 30, 1973), a case relied upon by the Petitioners in their Brief.

Before federal declaratory or injunctive relief is available

in the absence of a pending criminal prosecution there must be allegations of threatened bad faith prosecution, harassment or other unusual circumstances. In addition there must be an allegation of irreparable injury and harm to one seeking federal relief.

II.

PETITIONERS DID NOT USE DILIGENCE IN PRESENTING THEIR CONSTITUTIONAL ARGUMENTS TO THE STATE COURTS WHEN THEY VOLUNTARILY WAIVED THEIR RIGHT TO A TRIAL DE NOVO, AND MADE NO EFFORT TO APPEAL THEIR PLEA OF NOLO CONTENDERE IN THE CITY OF DALLAS' MUNICIPAL COURT.

Contrary to what has been asserted by the Petitioners, they did not use diligence in their challenge of the City of Dallas' Loitering Ordinance in the state courts. The Petitioners assert in pages 11 and 12 of their Brief, that their bringing a writ of prohibition before the Court of Criminal Appeals *prior* to their trial in municipal courts shows reasonable exhausiton.

In *Bergeron v. Travis County Court,* 174 S.W. 365 (Tex. Crim. App. 1915), a decision surprisingly relied upon by the Petitioners, the Texas Court of Criminal Appeals gave clear and specific directions as to how to challenge the constitutionality, validity and jurisdiction of corporation court (now referred to as municipal court)*.

The "proper place" to present a plea challenging the jurisdiction of corporation court, the constitutionality and validity

* The name of the "corporation court" was changed to "municipal court" by Acts 1969, 61st Legislature, Page 1689, Ch. 547. See Vernon's Ann. Civ. Stat., Art. 1194A.

of a local ordinance is in the corporation court "when the complaint was filed." *Bergeron v. Travis County Court,* supra, page 367. This decision states that the corporation court (now called municipal court) should have the first opportunity to rule on the constitutionality of an ordinance and entertain such plea that a defendant desires to bring therein, and *after* trial in corporation court, the county court then should be given "an opportunity to rule thereon." *Bergeron v. Travis County Court, supra,* held that a plea is "prematurely brought" if it is brought to the Texas Court of Criminal Appeals *before* it has been first considered by the county court. From a close reading of this decision, it appears that the Petitioners did not follow the only case they cited for the proposition contained in their brief that "reasonable exhaustion is satisfied by writ of prohibition." (See page 11-12, Petitioners' Brief)

It is only in cases in which a court has no jurisdiction, or in which it is exceeding its jurisdiction, that a writ of prohibition will lie; and a party petitioning for a prohibition in Texas must have objected to jurisdiction of court at the outset, and he must have no other legal remedy, or else it is not obligatory on the Texas Court of Criminal Appeals to grant a writ of prohibition. *Burks v. Stovall,* 324 S.W. 2d 874, 168 Tex. Cr. R. 207, (Ct. of Crim. App., 1959).

The Municipal Court of Dallas was within its jurisdiction to hear the cases of Tom E. Ellis and Robert D. Love. The $10.00 "nolo contendere" fines paid by the Petitioner, was cleraly within the limits of Municipal Court jurisdiction. Article 4.14, Texas Code of Criminal Procedure Annotated (1965). An appeal and a trial de novo, to the County Court was further undeniably available to Petitioners. Article 44.17, Texas Code of Criminal Procedure Annotated (1965). The Petitioners' writ of prohibition cannot be used as a substitute for an appeal. *Hebert v. Probate Court No. 1 of Harris County,* 466 S.W. 2d 849 (Ct. Civ. App. Houston 1971);*Miller v. Ben C. Connally,* 354 F. 2d 206 (5 Cir. 1965).

The Petitioners by foresaking their rights to a trial de novo under Article 44.17, Texas Rules of Criminal Procedure, cannot now, in this Court, set up and rely upon their alleged defenses in the state courts. The Petitioners unlike the Plaintiff in *Jones v. Wade,* supra, had a right of appeal, a right to have their case heard in the Texas criminal courts. Having failed to assert their remedies in the county court, it is now the Petitioners' burden to show that "this cause of action would not have afforded adequate protection." See *Younger v. Harris,* 27 L.Ed. 2d at 676; *Fenner v. Boykin,* 271 U.S. 240, 70 L.Ed. 927 (1926). The case for non-intervention in this suit has been made stronger because the Petitioners did not press their constitutional arguments at every step of the state procedings. *Palaio v. McAulifle,* 466 F. 2d 1230, 1233 (5 Cir. 1972).

III.

PETITIONERS' COMPLAINT DID NOT PRESENT A SUBSTANTIAL CONTROVERSY BETWEEN PARTIES HAVING ADVERSE LEGAL INTEREST OF SUFFICIENT IMMEDIACY AND REALITY TO WARRANT THE ISSUANCE OF A DECLARATORY JUDGMENT.

The Petitioners herein seek declaratory relief from possible future prosecution under the City of Dallas' Loitering Ordinance. The Supreme Court has repeatedly stated that the basic

question in seeking a declaratory judgment respecting the constitutionality of a statute is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy between the parties having adverse legal interests, of *sufficient immediacy and reality* to warrant the issuance of a declaratory judgment." *Golden v. Zwickler,* 394 U.S. 103, 22 L.Ed. 113, 118, 89 S. Ct. 956 (1969); *Maryland Casualty Co. v. Pacific Coal and Oil Co.,* 312 U.S. 270, 273, 85 L.Ed. 826, 828, 61 S. Ct. 510 (1941). (emphasis added)

When it is wholly conjectural that a person seeking declaratory relief will be again prosecuted under a statute, such a person should not be granted declaratory relief. *Golden v. Zwickler,* supra. Unless the Petitioners can show that they face a genuine and immediate threat of future prosecution under Ordinance 31-60, their case has lost its character as a present live controversy of the kind that must exist if the Supreme Court is to avoid rendering advisory opinions on abstract propositions. *Hall v. Beals,* 396 U.S. 45, 24 L.Ed. 2d 214, 218, 90 S. Ct. 200 (1969); *Golden v. Zwickler,* supra; *Baker v. Carr,* 369 U.S. 186, 204, 7 L.Ed. 2d 663, 667, 82 S. Ct. 691 (1962).

The "normal course of state criminal prosecutions cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future." *Boyle v. Landry,* 401 U.S. 77, 27 L.Ed. 2d 696, 700, 91 S. Ct. 758 (1971). The Third Circuit found a "very real threat of enforcement" before it affirmed the Three-Judge District Declaratory Judgment in *Thoms v. Heffernan,* 473 F. 2d 478, 485 (2 Cir. 1973). A trial court's Ruling to Dismiss

was upheld largely based on its finding of "No present threat of any further injury," *Alga, Inc. v. Crossland,* 327 F.S. 1264, 1266, affd, 459 F. 2d 1038 (5 Cir. 1972), cert den., 41 L.W. 329.

Even if the Petitioners' Complaint had asserted the inadequacy of relief in the Dallas County Criminal Court of Appeals, this would be an argument that Tom E. Ellis and Robert D. Love should not be able to advance. The Petitioners never did make an attempt to obtain a trial de novo. These litigants can only assert their own constitutional rights, and cannot sue for the deprivation of someone else's civil rights. *U. S. v. Raines,* 362 U.S. 17, 80 S. Ct. 519, 4 L.Ed. 2d 524 (1960); *O'Malley v. Brierley,* 477 F. 2d 785 (3 Cir. 1973). Before one can assert that the Dallas County Criminal Court of Appeals offers them inadequate relief, one should at least show that he had sought an appeal or a hearing from that court. The Petitioners, having failed to avail themselves of a trial de novo in the County Court, are not proper persons to advance any further the constitutional challenge of Ordinance 31-60.

CONCLUSION

Respondents respectfully submit that the Petitioners have not shown by their Complaint that they are entitled to federal equitable relief for the following reasons:

(1) They have failed to assert any allegations of threatened bad faith prosecution, harassment or any unusual circumstance justifying federal declaratory or injunctive relief;

(2) They have failed to show that they used diligence in

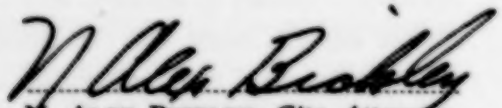
presenting their constitutional arguments in the State Courts;

(3) The Petitioners' Complaint does not present a controversy of sufficient immediacy and reality to warrant federal intervention.

The Respondents assert that based on the foregoing and those reasons more explicitly set out in his Judgment, the trial court did not abuse his discretion in dismissing the Petitioners' Complaint.

WHEREFORE, PREMISES CONSIDERED, Respondents pray that this Court deny Petitioners' Writ of Certiorari.

Respectfully submitted,



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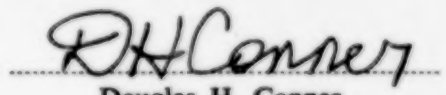
CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of this Brief has been served upon Mr. Walter W. Steele, Jr., 3315 Daniels, Dallas, Texas 75205, Attorney for Petitioners, by depositing the same in the United States Certified Mail, Return Receipt Requested, on this the 13th day of August, 1973.



Douglas H. Conner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-130

TOM E. ELLIS and ROBERT D. LOVE,

Petitioners,

—v.—

FRANK M. DYSON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

Opinion Below

The opinion of the United States District Court for the Northern District of Texas, Dallas Division, is reported at 358 F. Supp. 262, and is set forth in the Appendix at pp. 62-67. The order of the United States Court of Appeals for the Fifth Circuit summarily affirming the dismissal of petitioners' complaint is reported at 475 F.2d 1402 and is set forth in the Appendix at p. 70.

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 16, 1973. The petition for a writ of certiorari was filed on July 16, 1973 and was granted on April 22, 1974. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. May petitioners, who have been fined for violating a municipal loitering ordinance, seek Federal declaratory relief against threatened future arrests and prosecutions under the same ordinance on the ground that it is blatantly unconstitutional?

2. May petitioners, who have been fined for violating an allegedly unconstitutional municipal loitering ordinance, seek Federal equitable relief expunging any record of their arrest and conviction?

Statutes Involved

The Dallas municipal loitering ordinance, Section 31-60 of 1960 Revised Code of Civil and Criminal Ordinances of Dallas, Texas, as amended by Ordinance No. 12991, is set out in the Appendix to the Petition for Certiorari herein at 8a-10a.

Statement of the Case

On January 18, 1972, petitioners, while driving in an automobile, were arrested and charged with violating the Dallas municipal loitering ordinance (A-13)[1] which provides, in part:

> "It shall be unlawful for any person to loiter, as hereinafter defined, in, on or about any place, public or private, when such loitering is accompanied by activity or is under circumstances that afford probable cause for alarm or concern for the safety and well being of persons or for the security of property, in the surrounding area."

"Loitering" is defined by the ordinance to include:

> "The walking about aimlessly without apparent purpose; lingering; hanging around; lagging behind; the idle spending of time; delaying; sauntering and moving slowly about, where such conduct is not due to physical defects or conditions."

Prior to trial in the Dallas Municipal Court, petitioners, pursuant to Texas procedure, applied to the Texas Court of Criminal Appeals for a Writ of Prohibition to prevent their prosecution on the ground that the Dallas ordinance was facially unconstitutional, violating the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution. On February 21, 1972, the Texas Court of Criminal Appeals denied petitioners' application without opinion (A-7, 29-33).

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[1] "A-__" refers to the separately printed Appendix filed herein.

Petitioners, thereupon, proceeded to trial in the Dallas Municipal Court. After unsuccessfully moving to dismiss the charges against them on the ground that the loitering ordinance was unconstitutional, petitioners entered pleas of *nolo contendere*, and were fined $10 each (A-7-8, 49).

Rather than seek a trial *de novo* in the County Court, in connection with which they would have been subject to a more stringent sentence,[2] petitioners commenced this proceeding in the United States District Court for the Northern District of Texas, Dallas Division, on March 27, 1972, seeking two items of relief (A-9-10).

First, petitioners sought a declaratory judgment that the Dallas municipal loitering ordinance was unconstitutional and could not be utilized to arrest petitioners in the future.[3]

Second, petitioners sought equitable relief expunging any record of their arrest and conviction under the ordinance.

In support of their requests for relief, petitioners presented evidence that between 40-50 loitering prosecutions were commenced each month in Dallas, with a systematic refusal on the part of the Municipal or County courts to

[2] Texas maintains a "two-tier" system of criminal justice similar to the Kentucky system which was before this Court in *Colten* v. *Kentucky*, 407 U.S. 104 (1972). Under Texas law, petitioners could have obtained a trial *de novo* by filing a $50 bond. However, they would have been subject to a more severe sentence than the $10 fine imposed by the Municipal Court. No procedure exists in Texas which would have permitted petitioners to have appealed from the Municipal Court without risking a more severe sentence after trial *de novo*. Compare, *Colten* v. *Kentucky*, 407 U.S. 104 (1972) with *North Carolina* v. *Pearce*, 395 U.S. 711 (1969).

[3] Petitioners sought no injunctive relief concerning the future application of the loitering ordinance to them, choosing instead to rely upon the less intrusive remedy of declaratory judgment.

deal with the obvious constitutional infirmities raised by the loitering ordinance (A-31-41). In answer to petitioners' interrogatories, respondents admitted to continuing to arrest more than two people per day under the statute (A-68).

Believing itself bound by the stringent guidelines established by the Fifth Circuit in *Becker* v. *Thompson*, 459 F.2d 919 (5th Cir. 1972), rev'd *sub nom. Steffel* v. *Thompson*, 94 S. Ct. 1209 (1974), the District Court dismissed petitioners' complaint, without reaching the merits (A-65-67). The Fifth Circuit, following *Becker*, summarily affirmed (A-70). This Court granted certiorari shortly after unanimously reversing *Becker*.

Summary of Argument

1. The courts below explicitly relied upon *Becker* v. *Thompson*, 459 F.2d 919 (5th Cir. 1972), in declining to entertain petitioners' complaint. In view of the unanimous reversal of *Becker* by this Court in *Steffel* v. *Thompson*, 94 S. Ct. 1209 (1974), the most appropriate disposition of this appeal would appear to be a remand to the trial court for reconsideration of the jurisdictional issues in light of the demise of *Becker*. *E.g.*, *Villa* v. *Van Schaick*, 299 U.S. 152 (1936); *Daniel* v. *Goliday*, 398 U.S. 73 (1970); *Byrne* v. *Karalexis*, 401 U.S. 216 (1971).

2. Under principles enumerated in *Steffel* v. *Thompson*, 94 S. Ct. 1209 (1974) and *Allee* v. *Medrano*, —— U.S. ——, 42 U.S.L.W. 4736 (May 20, 1974), the District Court should have entertained petitioners' request for prospective declaratory relief. Since no prosecutions were actually pend-

ing against petitioners at the time they sought declaratory relief from threatened future prosecution, considerations of comity did not require dismissal of petitioners' complaint. Compare, *Younger* v. *Harris,* 401 U.S. 37 (1971) with *Steffel* v. *Thompson,* 94 S. Ct. 1209 (1974) and *Allee* v. *Medrano,* —— U.S. ——, 42 U.S.L.W. 4736 (May 20, 1974).

3. In addition to seeking declaratory relief from threatened future prosecution, petitioners were entitled to seek equitable relief expunging any record of their arrest and conviction under a blatantly unconstitutional municipal ordinance. While, ordinarily, such a collateral challenge to the validity of a state criminal conviction would proceed under, and be governed by, Federal *habeas corpus,* the nature of the sentence imposed upon petitioners renders the availability of *habeas corpus* questionable. Accordingly, petitioners may seek to expunge their records pursuant to 42 U.S.C. §1983. No requirement of exhaustion of state judicial remedies exists in cases brought pursuant to 42 U.S.C. §1983, especially when the state remedy required petitioners to risk an increased sentence as the price of seeking Federal review of their constitutional claims. *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973).

ARGUMENT

I.

The reversal by this Court of the Fifth Circuit authority deemed controlling below necessitates a remand to the trial court for reconsideration in light of the change in the governing law.

The trial court's initial consideration of the jurisdictional issues raised by this case was governed entirely by the stringent guidelines laid down by the Fifth Circuit in the wake of *Younger* v. *Harris,* 401 U.S. 37 (1971). *Becker* v. *Thompson,* 459 F.2d 919 (5th Cir. 1972). Under *Becker,* requests for prospective declaratory relief were to be governed by *Younger,* whether or not criminal prosecutions were actually pending against plaintiffs at the time the Federal action was commenced. Accordingly, both the District Court and the Fifth Circuit summarily dismissed petitioners' complaint without further analysis.

However, in *Steffel* v. *Thompson,* 94 S. Ct. 1209 (1974), this Court unanimously reversed the Fifth Circuit and ruled that, in the absence of a pending state prosecution, a civil rights plaintiff possessing the requisite standing is entitled to seek Federal declaratory relief against threatened future prosecutions under an allegedly unconstitutional state statute free from the strictures imposed by *Younger.*

Understandably, neither the trial court, nor the Fifth Circuit, addressed petitioners' complaint in the light of post-*Steffel* jurisprudence. Accordingly, petitioners respectfully suggest that the most appropriate disposition of this appeal calls for a vacation of the dismissals below

and a remand to the trial court for re-consideration of petitioners' complaint in light of the reversal of *Becker* by this Court.[4] *E.g., Villa* v. *Schaick*, 229 U.S. 152 (1936); *Daniel* v. *Goliday*, 398 U.S. 73 (1970); *Byrne* v. *Karalexis*, 401 U.S. 216 (1971).

II.

Petitioners are entitled to seek Federal declaratory relief against the threat of future prosecution under the unconstitutional Dallas loitering ordinance.

A. *The History and Purpose of the Civil Rights Act of 1871.*[5]

Prior to the Civil War, the Federal courts played virtually no role in enforcing Federal constitutional guarantees against encroachment by state officials. However, post-Civil War legislation effected a virtual revolution in the role of the Federal courts as significant forums for the adjudication of claims that state officials were acting in violation of Federal constitutional guarantees. The establishment of Federal Question jurisdiction in 1875 and the enactment of a broad jurisdictional grant in the area of Civil Rights in 1871 provided Americans, for the first time, with a choice of two parallel judicial systems—state and

[4] Among the issues which would confront the District Court on remand is whether, given the passage of more than two years, a case or controversy continues to exist. Fresh evidence concerning the status and whereabouts of the petitioners and the enforcement patterns of the respondents would be desirable. Cf. *Steffel* v. *Thompson*, 39 L.Ed.2d at 514-15.

[5] Petitioners' recitation of the history and purpose of the Civil Rights Act of 1871 (42 U.S.C. §1983) is drawn primarily from the decisions of this Court in *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Zwickler* v. *Koota*, 389 U.S. 241 (1967); *Mitchum* v. *Foster*, 407 U.S. 225 (1972); and *Steffel* v. *Thompson*, 94 S. Ct. 1209 (1974).

Federal—within which to seek vindication of Federal constitutional rights. Moreover, the decision of this Court in *Ex parte Young*, 209 U.S. 123 (1907), permitted the Federal judiciary to grant effective prospective relief to litigants challenging state action as violative of Federal constitutional norms. See also, *Edelman* v. *Jordan*, —— U.S. ——, 42 U.S.L.W. 4419 (March 26, 1974).

The net effect of the post-Civil War jurisdictional legislation and the decision of this Court in *Ex parte Young, supra,* was sustained growth in the role of the Federal judiciary as primary guardians of Federal constitutional rights against governmental encroachment—State or Federal.

Thus, a potential litigant who believes his or her Federal constitutional rights have been or will be violated by state officials acting under color of law, has been granted a valuable choice of forum by Congress. Such a litigant may elect to present his Federal constitutional claims to an appropriate state court, or he may, if he wishes, opt for the protection of the Federal courts. In the instant case, petitioners' attempt to invoke the choice of forum granted to them by the Civil Rights Act of 1871 has been frustrated by the erroneous refusal of the Federal courts to entertain their complaint.

B. *Petitioners' Request for Declaratory Relief Against Future Prosecutions Poses a Classic Case or Controversy.*

Petitioners have each been convicted and fined for violating the Dallas municipal loitering statute. Each understandably fears re-arrest pursuant to respondents' conceded practice of effecting at least two loitering arrests in Dallas each day.

In *Boyle* v. *Landry*, 401 U.S. 77 (1971), this Court ruled that a speculative and unreasonable subjective fear of prosecution would not automatically clothe a litigant with standing to challenge the constitutionality of a state statute. See also, *O'Shea* v. *Littleton*, —— U.S. ——, 42 U.S.L.W. 4139 (Jan. 14, 1974).

However, in *Steffel* v. *Thompson*, 94 S. Ct. 1209 (1974) this Court ruled that an individual to whom a credible threat of arrest had been directed had standing to challenge the constitutionality of the statute on which the threat was predicated.

In the instant case, petitioners have received more than the mere threat of arrest—they have actually been arrested and convicted. Moreover, respondents have conceded that they are continuing to arrest persons under the Dallas loitering ordinance at the rate of more than two per day. Thus, since petitioners' fear of arrest and prosecution is based on objective and credible criteria, they satisfy the *Boyle-Steffel* test and possess standing to seek declaratory relief from future prosecution.[6]

C. *Petitioners' Request for Declaratory Relief Against Future Prosecutions Is Not Barred by Comity.*

Despite the Congressional mandate that civil rights plaintiffs be offered a choice of forum between state and Federal courts, this Court has ruled that considerations of comity may bar a Federal court from interfering with a pending state prosecution, in the absence of bad faith or other extraordinary circumstances justifying immediate

[6] The District Court agreed that petitioners possessed the requisite degree of standing to satisfy the case or controversy requirements established by this Court. 358 F. Supp. at 265 n.4 (A-65).

Federal intervention. *Younger* v. *Harris*, 401 U.S. 37 (1971). In the absence of an actually pending criminal prosecution, however, this Court has recognized that no notions of comity may outweigh the Congressional determination to allow a civil rights plaintiff access to a Federal forum to vindicate his Federal constitutional rights. *Steffel* v. *Thompson*, 94 S. Ct. 1209 (1974); *Allee* v. *Medrano*, —— U.S. ——, 42 U.S.L.W. 4736 (May 20, 1974); *Lake Carriers' Association* v. *MacMullen*, 406 U.S. 498, 509 (1972).

All concede that no prosecutions were pending against petitioners at the time they sought Federal relief against future arrest. Indeed, having arrested and successfully prosecuted petitioners for loitering, Texas had fully vindicated any comity interest which it might advance in connection with the only prosecution in which petitioners were involved. Thus, to the extent petitioners seek relief from future arrests, they in no way impinge upon any comity interest of Texas.[7]

D. *Petitioners' Request for Declaratory Relief Against Future Prosecutions Is Not Barred by Failure to Exhaust State Judicial Remedies.*

It is, of course, no longer open to doubt that civil rights plaintiffs are under no obligation to exhaust state judicial remedies prior to seeking relief in Federal court. *E.g.*, *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973); *Monroe* v. *Pape*, 365 U.S. 167 (1961).

[7] Petitioners' status is, therefore, readily distinguishable from that of a defendant against whom criminal prosecutions are actually pending who seeks to affirmatively challenge the state statutes involved. *Roe* v. *Wade*, 410 U.S. 113, 126-127 (1973). Whatever comity interests might exist during the pendency of the criminal prosecution, evaporate upon its successful completion.

Petitioners, therefore, were under no obligation to present their Federal constitutional claims to the Texas courts in order to qualify for Federal review. Thus, to the extent petitioners seek declaratory relief from future prosecution, it was erroneous for the District Court to have suggested a requirement of exhaustion of state judicial remedies.[8]

III.

Petitioners are entitled to seek Federal equitable relief expunging any record of their arrest and conviction under the unconstitutional Dallas loitering ordinance.

In addition to seeking Federal declaratory relief from future prosecution, petitioners seek retrospective equitable relief expunging any record of their arrest and conviction. Ordinarily, of course, such a collateral attack upon a state criminal conviction would proceed under, and be governed by, principles of Federal *habeas corpus*. *E.g.*, *Fay* v. *Noia*, 372 U.S. 391 (1963). However, the relatively minor nature of loitering as an offense; the failure to impose any custody upon petitioners;[9] and the precise nature of the relief

[8] Under Texas law, petitioners would have been obliged to risk a substantially more severe sentence as the price of pursuing their original conviction in the state courts. Thus, even if some requirement of exhaustion of state judicial remedies existed (it does not), surely it could not require a civil rights plaintiff to risk an increase in his sentence in order to enjoy the benefits of the Civil Rights Act of 1871. Moreover, petitioners, in fact, unsuccessfully sought to present their constitutional claims to the Texas Court of Criminal Appeals and, thus, satisfied any reasonable exhaustion requirement. See, *infra*, at pp. 15-16.

[9] The maximum penalty for violating the Dallas loitering ordinance is the imposition of a $200 fine. In the absence of any physical custody, or the threat of physical custody, genuine doubt exists as to whether *habeas corpus* relief would be available, even under the modern view of the scope of the writ.

sought,[10] combine to render the availability of post-conviction Federal *habeas corpus* to petitioners extremely doubtful. *E.g.*, *Hensley* v. *Municipal Court*, 411 U.S. 345 (1973). Accordingly, petitioners seek to vindicate their constitutional rights and to clear their records pursuant to the general grant of civil rights jurisdiction to the Federal courts.

Unlike Federal *habeas corpus*, the Civil Rights statutes contain no requirement that a prospective plaintiff exhaust state judicial remedies as a condition precedent to invoking Federal relief. *E.g.*, *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973). Thus, the question has become whether a policy of exhaustion ought to invoked in various federal actions based upon the Civil Rights Acts. The decision of this Court in *Monroe* v. *Pape*, 365 U.S. 167 (1961), has answered that question in the negative. There this Court reached the general conclusion, by examining the history of the Civil Rights Acts, that Congress intended the federal remedies to be supplementary to any state remedy that might be available to redress unconstitutional action under color of state law, and that a plaintiff need not exhaust state judicial remedies before suing under the Act. The same conclusion has been reached in a variety of other circumstances. *Gibson* v. *Berryhill*, 411 U.S. 564 (1973); *Wilwording* v. *Swenson*, 404 U.S. 249, 251 (1971); *Damico* v. *California*, 389 U.S. 416 (1967); *Houghton* v. *Shafer*, 392 U.S. 639 (1968); *McNeese* v. *Board of Education*, 373 U.S. 668 (1963); see also *Preiser* v. *Rodriguez*, 411 U.S. 475, 477

[10] Even if *habeas corpus* were available in the absence of a threat of physical custody, serious doubt exists as to the power of a *habeas corpus* court to grant affirmative equitable relief expunging a criminal record, since such relief would entail more than the mere release from custody.

(1973). The decision in *Steffel* v. *Thompson*, 94 S. Ct. 1209 (1974) has reaffirmed that principle.

Thus, petitioners were under no obligation to ventilate their constitutional claims in the Texas courts prior to seeking relief from the detrimental effects of a criminal record resulting from arrest and conviction under a blatantly unconstitutional statute.

Moreover, even if one applies traditional notions of exhaustion developed in the context of Federal *habeas corpus* to petitioners' situation, it becomes apparent, first, that no duty to exhaust existed and, second, that petitioners exhausted the only meaningful state remedy open to them.

A. *Petitioners Were Under No Duty to Exhaust State Remedies Which Rendered Them Vulnerable to an Increased Sentence.*

After conviction in the Dallas Municipal Court, petitioners were entitled under Texas law to post a bond of $50 and to demand a trial *de novo* in the appropriate county court.[11] *Tex. Code Crim. Proc. Ann.*, Art. 44.16 (1965). In connection with any such trial *de novo*, the Municipal Court proceeding would, under Texas law, be deemed a nullity, and the presiding judge would be empowered to impose a sentence upon petitioners far more stringent than the $10 fine imposed by the Municipal Court.[12] See generally, *Colten* v. *Kentucky*, 407 U.S. 104 (1972). Not surprisingly, therefore, petitioners elected to forego a trial *de novo* in the county court, rather than risk an increased fine.

[11] Under Texas law, trial *de novo* was the exclusive form of review open to petitioners. No procedure exists for obtaining appellate, as opposed to *de novo*, review of a conviction in Dallas Municipal Court.

[12] Petitioners would have been subject to a fine up to $200 in a trial *de novo*.

In *Fay* v. *Noia*, 372 U.S. 391 (1963), this Court ruled that the statutory exhaustion requirements of Federal *habeas corpus* would not preclude *habeas corpus* jurisdiction when a litigant's failure to invoke state appellate remedies was attributable to a credible fear that a more stringent sentence might be imposed upon him by the "appellate" forum. In the instant case, the risk to petitioners in a trial *de novo* was clear. Since under Texas law, the Municipal Court proceedings would be deemed a nullity, the potential sentence after trial *de novo* in the county court was not limited by the strictures of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), but was limited only by the statutory maximum. *Colten* v. *Kentucky*, 407 U.S. 104 (1972). Under the narrow "two-tier" situation exemplified by *Colten*, it would be manifestly unfair to compel Civil Rights litigants to face a Hobson's choice of an increased sentence as the price of exercising their right to present their constitutional grievances to a Federal court. Where, as here, no statutory obligation to exhaust state judicial remedies exists, it would be doubly erroneous to engraft such a restriction upon petitioners who have done nothing more than shun a state *de novo* trial because they feared the imposition of a more stringent sentence.[13]

B. *Petitioners Presented Their Claims to the State Courts.*

Faced with the threat of more stringent sentences after a trial *de novo*, yet desirous of presenting their constitu-

[13] In addition, while a state *de novo* trial might have provided relief from the then pending prosecution, it would have done nothing to protect petitioners against future prosecutions under the statute. Finally, under Texas law, even if petitioners had been successful in a trial *de novo*, no known procedure existed to expunge their record of arrests. See generally, *Hansson* v. *Harris*, 252 S.W.2d 600 (Tex. Ct. Civ. App. 1952).

tional claims to the Texas courts prior to seeking Federal relief, petitioners attempted the only procedural expedient open to them and unsuccessfully sought a Writ of Prohibition in the Texas Court of Criminal Appeals. Under Texas practice, such an application presented the Texas courts with the discretionary opportunity to rule on the constitutionality of the Dallas loitering statute. Unfortunately, the Texas Court of Criminal Appeals declined to entertain petitioners' application. Thus, petitioners in fact exhausted the only state procedure open to them which would not have subjected them to the real threat of substantially more stringent sentences. Having thus presented their claims to the Texas courts, petitioners may not be taxed with a failure to have exhausted state judicial remedies.

C. *The District Court Had Jurisdiction to Order the Expungement of Any Record of Petitioners' Arrest and Conviction Under an Unconstitutional Statute.*

(1) The Dallas Loitering Ordinance Is Facially Invalid.

Laws against vagrancy and loitering are part of the dragnet approach to maintenance of public order. They are used as devices for investigating and preventing crime and for removing "nuisances" and "undesirables" from public places. *See generally,* Douglas, *Vagrancy and Arrest on Suspicion,* 70 YALE L.J. 1 (1960); Foote, *Vagrancy-Type Law and Its Administration,* 104 U. PA. L. REV. 603 (1956). However, the governmental interest in the maintenance of public order must yield to the Constitution when the broad scope of an ordinance is so vague that it:

> "'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' United States v. Harriss, 347 U.S. 612, 617, 98 L.Ed. 989, 996, 74 S. Ct. 808, and because it encourages arbitrary and erratic arrests and convictions. Thornhill v. Alabama, 310 U.S. 88, 84 L.Ed. 1093, 60 S. Ct. 736; Herndon v. Lowry, 301 U.S. 242, 81 L.Ed. 1066, 57 S. Ct. 732." *Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 162 (1972).

Loitering statutes' crime prevention components improperly aim at suspected or potential conduct, rather than incipient or observable conduct, and thus conflict with the Fourth Amendment requirement that arrests be based upon probable cause. *Beck* v. *Ohio,* 379 U.S. 89 (1964); *Henry* v. *United States,* 361 U.S. 98 (1959); *Papchristou* v. *City of Jacksonville,* 405 U.S. 156, 169 (1972). The vagueness test of *Papachristou* requires first a determination whether the ordinance prohibits conduct in sufficiently precise terms so as to give a reasonably intelligent person notice of what conduct is proscribed. *Id.* at 162.

The language of the Dallas ordinance is too vague and indefinite to enable a citizen to conform his activities to it. The elements of loitering under the ordinance can be established by suspicious circumstances of which the citizen is unaware and for which he is not responsible. As a result, criminal liability can be imposed when no criminal intent exists. The requirement of probable cause for alarm or concern can rest solely in the mind of the beholder, a police officer, or any other person.

The ordinance gives insufficient guidelines for enforcement, permitting arrests and convictions for suspicion or for possible crime based on circumstances less compelling than the reasonable and articulable factors required to sustain mere on-the-scene frisks. *Terry* v. *Ohio,* 392 U.S. 1 (1968); *Sibron* v. *New York,* 392 U.S. 40 (1968). The ordinance invites the abuse of pretextual arrests of members

of unpopular groups or persons suspected of engaging in other crimes without sufficient probable cause for them to be arrested for the underlying crime. In summary:

> "To the extent the [ordinance] can be interpreted to support dragnet, street-sweeping operations absent probable cause of actual criminality, it conflicts with established notions of due process. Beck v. Ohio, supra; Henry v. United States, supra; Wong Sun v. United States, 371 U.S. 471, 479-482, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Even in the absence of purposeful circumvention of traditional standards for lawful arrests, [the ordinance] confers discretion that is simply too unbridled to satisfy due process standards. The 'infirmity' lies in the imprecision of the [ordinance], not the subjective intent of the officers. The Supreme Court has noted, '[w]ell-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law.' Baggett v. Bullitt, supra, 377 U.S. at 373, 84 S. Ct. at 1323." *United States ex rel. Newsome* v. *Malcolm,* 492 F.2d 1166, 1173-74 (2d Cir. 1974).

In *Newsome* the Second Circuit struck down a New York state loitering statute that was more narrowly drawn than the Dallas city ordinance, since the New York statute required the refusal of the individual to give his name and explanation of his conduct. If the New York loitering statute was so clearly unconstitutional on its face under Supreme Court standards, then how much more constitutionally deficient is the Dallas loitering ordinance.

The Dallas ordinance is also overbroad on its face in numerous respects. For example, it is especially offensive that loitering, as defined, can be committed "in, on, or about

any place, public or private [which] term . . . shall include all places distinctively private, such as homes or private residences and apartment houses." Thus, under plain-meaning interpretation, people could be guilty of loitering in their own homes if police thought something suspicious was going on. A vague law, which is also as overbroad as this ordinance is, presents special grounds for federal court adjudication. *Baggett* v. *Bullitt,* 377 U.S. 360 (1964); *see generally,* Note, 109 U. Pa. L. Rev. 66 (1960).

(2) Federal Courts Possess Power to Order the Expungement of Records of Unconstitutional Arrests and Convictions.

The cases granting expunction of criminal records fall into three distinct categories. The cases of the oldest group were those in which the "petitioner could point to improper dissemination of his records, such as their release to newspapermen or their placement in a 'rogue's gallery' after his acquittal." *Davidson* v. *Dill,* 503 P.2d 157, 161 (Colo. 1972) (en banc). A second group of more recent cases has allowed expungement "where, due to the impropriety of the original arrest, the records serve no legitimate police function." *Id., citing Menard* v. *Mitchell,* 430 F.2d 486 (D.C. Cir. 1970); *United States* v. *McLeod,* 385 F.2d 734 (5th Cir. 1967); *Gomez* v. *Wilson,* 323 F. Supp. 87 (D.D.C. 1971); *Wheeler* v. *Goodman,* 306 F. Supp. 58 (W.D.N.C. 1969); *Hughes* v. *Rizzo,* 282 F. Supp. 881 (E.D. Pa. 1968). The final group, which the Colorado court in *Davidson, supra,* found to be compelling, is the line of authority holding that a court should order expungement of an arrest record "when the harm to the individual's right of privacy or dangers of unwarranted adverse consequences outweigh the public interest in retaining the records in police files."

Id., citing United States v. *Kalish*, 271 F. Supp. 968 (D.P.R. 1967); *Kowall* v. *United States*, 53 F.R.D. 211 (W.D. Mich. 1971); *Eddy* v. *Moore*, 5 Wash. App. 334, 487 P.2d 211 (1971). Thus, "[t]he principle is well established that a court may order the expungement of records, including arrest records, when that remedy is necessary and appropriate in order to preserve basic legal rights." *Sullivan* v. *Murphy*, 478 F.2d 938, 968 (D.C. Cir. 1973). "The judicial remedy of expungement is inherent and is not dependent upon express statutory provision . . . ." *Menard* v. *Saxbe*, 15 Crim. L. Rep. 2105 (D.C. Cir., April 23, 1974).

A person with a criminal record is in a substantially different position in relation to the police than other citizens. When a crime occurs, those persons with records are more likely to be investigated, and if suspected, more likely to be arrested. To the extent that an arrest record stimulates a greater police involvement in the life of an individual, his privacy is diminished. Note, 49 N.C. L. Rev. 509, 514 (1971).

The collateral legal consequences of a criminal record are well known:

> An arrest record may be used by the police in determining whether subsequently to arrest the individual concerned, or whether to exercise their discretion to bring formal charges against an individual already arrested. Arrest records have been used in deciding whether to allow a defendant to present his story without impeachment by prior convictions, and as a basis for denying release prior to trial or an appeal; or they may be considered by a judge in determining the sentence to be given a convicted offender.

Menard v. *Mitchell*, 430 F.2d 486, 490-91 (D.C. Cir. 1970) (citations omitted).

The collateral economic consequences are similarly well established. Employers seldom hire individuals having criminal records, especially when there are others available who have not been arrested. Even when the employer pays lip-service to the requirement that he not discriminate on the basis of an arrest record, the potential employee often finds the vacancy filled while the employer "investigates" his arrest. *See* Note, 56 Cornell L. Rev. 470 (1971). One employer has even stated that he could obtain the arrest record of any prospective employee if he were willing to pay to have the data processed. Hess & LePoole, *Abuse of the Record of Arrest Not Leading to Conviction*, 13 Crime and Delinquency 494 (1967). For many licensing boards and agencies, absence of a criminal record is one of the criteria employed in evaluating whether or not a candidate is qualified to receive a license. Similarly in many of the professional fields, authorities will frequently consider a criminal record in deciding whether a person should be allowed to practice his chosen profession, and educational opportunities may be withheld from a record holder for the same reason. McGlain, *The FBI's Right to Retain and Disseminate Arrest Records of Persons Not Convicted of a Crime May Be Limited by the First and Fifth Amendments*, 46 Notre Dame Law 825, 830 (1971).

> [W]hen an accused is acquitted of the crime or when he is discharged without conviction, no public good is accomplished by the retention of criminal identification records. On the other hand, a great imposition is placed upon the citizen. His privacy and dignity is invaded as long as the Justice Department retains

'criminal' identification records, 'criminal' arrest, fingerprints, and a rogue's gallery photograph.

United States v. *Kalish,* 271 F. Supp. 968, 970 (D.C.P.R. 1967). Clearly, where an arrest is not based upon probable cause, but mere alarm, suspicion, or belief, and, in addition, the arrest is made under an unconstitutional city ordinance, the government simply cannot show a compelling state interest in the retention of that record of arrest.

While the assertion of a right to expungement on constitutional grounds is relatively new, the State courts of both Washington and Colorado have recognized it as included within the right of privacy, even before they had the benefit of this Court's guidance in *Roe* v. *Wade,* 410 U.S. 113 (1973) and *Doe* v. *Bolton,* 410 U.S. 179 (1973). *Eddy* v. *Moore,* 487 P.2d 211, 217 (Wash. App. 1971); *Davidson* v. *Dill.* 503 P.2d 157 (Colo. 1972) (en banc).

In the instant case, the petitioners can affirmatively demonstrate their nonculpability, *i.e.,* that their arrest and convictions violated basic constitutional rights. To allow the retention of petitioners' records is, in effect, to allow the punishment, by collateral legal and economic consequences, of petitioners for innocent activity made criminal under an unconstitutional ordinance.

No legitimate governmental interest would be served by so irrational an imposition of punishment. See generally, *Wheeler* v. *Goodman,* 306 F. Supp. 58, 65-66 (W.D. N.C. 1969), remanded for reconsideration in light of *Younger* v. *Harris,* 401 U.S. 987 (1971), reaffirmed on rehearing 330 F. Supp. 1356; *United States* v. *Kalish,* 271 F. Supp. 968 (D.P.R. 1967); *Sullivan* v. *Murphy,* 478 F.2d 938, 970 (D.C. Cir. 1973); *Menard* v. *Saxbe, supra.*

CONCLUSION

For the reasons stated above, petitioners respectfully request that the orders of the Courts below dismissing petitioners' complaint be vacated and that this case be remanded for reconsideration in light of *Steffel* v. *Thompson,* 94 S. Ct. 1209 (1974). In the alternative, petitioners urge that the decision of the District Court be reversed.

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In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-130

TOM E. ELLIS and ROBERT D. LOVE,
Petitioners,

v.

FRANK DYSON, et al.,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF OF THE RESPONDENTS

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In the

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OCTOBER TERM, 1973

No. 73-130

TOM E. ELLIS and ROBERT D. LOVE,
Petitioners,

v.

FRANK DYSON, et al.,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF OF THE RESPONDENTS

OPINIONS BELOW

The Opinion of the United States District Court for the Northern District of Texas, Dallas Division, is reported at 358 F. Supp. 262, and is set forth in the Appendix at Pages 62 through 67. The Order of the United States Court of Appeals for the Fifth Circuit summarily affirming the dismissal of the Petitioners' Complaint is reported at 475 F. 2d 1402 and is set forth in the Appendix at Page 70.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 16, 1973. The Petition for Writ of Certiorari was received and docketed in the Supreme Court of the United States on July 16, 1973, and was granted on April 22, 1974. The jurisdiction of the Court is alleged by the Petitioners under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED BY PETITIONERS

1. May Petitioners, who have been fined for violating a municipal loitering ordinance, seek Federal declaratory relief against threatened future arrests and prosecutions under the same ordinance on the ground that it is blatantly unconstitutional?

2. May Petitioners, who have been fined for violating an allegedly unconstitutional municipal loitering ordinance, seek Federal equitable relief expunging any record of their arrest and conviction?

STATUTORY PROVISIONS PRINCIPALLY INVOLVED

Section 31-60 of the 1960 Revised Code of Civil and Criminal Ordinances of Dallas, Texas, as amended by Ordinance No. 12991 is set out in Petitioners' Appendix, Pages 8a through 10a.

Article 4.14 of the Texas Code of Criminal Procedure:

> The corporation court in each incorporated city, town or village of this State shall have jurisdiction within the corporate limits in all criminal cases arising under the ordinances of such city, town or village, and shall have concurrent jurisdiction with any justice of the peace in any precinct in which said city, town or village is situated

> in all criminal cases arising under the criminal laws of this State, in which the punishment is by fine only, and where the maximum of such fine may not exceed $200.00, and arising within such corporate city limits.

Article 44.17 of the Texas Code of Criminal Procedure:

> In all appeals from justice and corporation courts to the county court, the trial shall be de novo in the trial in the county court, the same as if the prosecution had been originally commenced in that court.

STATEMENT OF THE CASE

The Petitioners, Tom E. Ellis and Robert D. Love, brought this action against various named officials of the City of Dallas under Title 42, United States Code, Section 1983. Tom E. Ellis and Robert D. Love did not allege that they had any pending criminal proceedings against them but seek declaratory relief against possible future prosecution under the City of Dallas' Loitering Ordinance, Section 31-60 of the Dallas City Code. The Petitioners made no allegations in their Complaint of bad faith prosecution by any named or unnamed City of Dallas officials. The District Court considering the pleadings, reading the briefs, and hearing argument of counsel, found no allegations of bad faith prosecution, harassment or other unusual circumstances which would cause the Petitioners to suffer irreparable harm and injury through the enforcement of the subject ordinance. For those reasons more extensively set forth in its written opinion, the District Court on December 13, 1972, granted the Defendants-Respondents' Motion for Dismissal. The Petitioners by virtue of this dismissal were denied both injunctive and declaratory relief. This Court granted certiorari on April 22, 1974.

STATEMENT OF FACTS

The Petitioners' Complaint in the trial court alleges that they were arrested in the City of Dallas on January 18, 1972, and charged with violating Section 31-60, Revised Code of Civil and Criminal Ordinances of the City of Dallas (A-5).* Petitioners applied to the Texas Court of Criminal Appeals for a writ of prohibition to prevent their prosecution under this Ordinance. On February 21, 1972, the Texas Court of Criminal Appeals denied the Petitioners' application for writ or prohibition without written opinion (A-7). In municipal court the Petitioners allege that they renewed their objections to the jurisdiction of that court on the ground that the ordinance which they were charged with violating was unconstitutional (A-7). The motion was denied and the Petitioners entered pleas of nolo contendere and were convicted. The municipal court records indicate that both Petitioners paid $12.50 each ($10.00 fine plus $2.50 court cost) (A-49).

The Petitioners never asserted in their Complaint the inadequacy of the state remedies nor did they raise this argument on appeal to the Fifth Circuit. The Petitioners are now raising for the first time in the federal courts, their argument that a trial de novo in the county court would subject the Petitioners to a more stringent sentence than that which existed in the City of Dallas' municipal court. The Petitioners never controverted or challenged in the trial court the Defendants-Respondents' affirmative allegation that Texas law provides an adequate remedy for any person charged with a violation of Ordinance 31-60. The affidavits of Henry J. Albach, Edward

* The designation "A" refers to the appendix filed to Petitioners' Brief.

Koppman, Robert E. Goodfriend, and Lon Curtis, were never made an exhibit or part of the Petitioners' Complaint. Although a trial de novo to the county court is sanctioned by Article 44.17, Code of Criminal Procedure, State of Texas, the Petitioners made no further effort to reurge the constitutionality of the subject ordinance in the state courts.

ARGUMENT AND AUTHORITIES

I.

WHEN THE PETITIONERS VOLUNTARILY ENTERED THEIR PLEAS OF NOLO CONTENDERE THEY WAIVED THEIR RIGHTS TO FURTHER ASSERT THEIR CONSTITUTIONAL RIGHTS AND PRIVILEGES.

The Petitioners seek to have a declaratory judgment holding the Dallas Municipal Loitering Ordinance unconstitutional and they further seek equitable relief expunging any record of their arrest and conviction under this subject ordinance. The Petitioners with assistance of their counsel filed a writ of prohibition prior to their appearance in municipal court (A-7, 29-33). In both the writ for prohibition and in municipal court the Petitioners objected to the constitutionality of Section 31-60 of the Dallas City Code (A-7 and 8). With apparently the advice of counsel, the Petitioners chose to plead nolo contendere rather than challenge further the constitutionality of Section 31-60, or further assert any defense in the state courts to the criminal charges filed against them.*

* Although the record is silent as to the counsel's presence in municipal court, it can be seen that Petitioners did have counsel prior to and after the proceedings in municipal court. This same counsel has represented the Petitioners since the filing of the writ of prohibition.

In *Bergeron v. Travis County Court*, 174 S.W. 365 (Tex. Crim. App. 1915), the Texas Court of Criminal Appeals gave clear and specific directions as to how to challenge the constitutionality, validity and jurisdiction of corporation court (now referred to as municipal court).*

The "proper place" to present a plea challenging the jurisdiction of corporation court, the constitutionality and validity of a local ordinance is in the corporation court "when the complaint was filed." *Bergeron v. Travis County Court*, supra, page 367. This decision states that the corporation court (now called municipal court) should have the first opportunity to rule on the constitutionality of an ordinance and entertain such plea that a defendant desires to bring therein, and *after* trial in corporation court, the county court then should be given "an opportunity to rule thereon." *Bergeron v. Travis County Court*, supra, held that a plea is "prematurely brought" if it is brought to the Texas Court of Criminal Appeals *before* it has been first considered by the county court.

It is well established that when a person is accused of a crime he may waive almost all his constitutional rights and privileges. *Levin v. U.S.*, 5 F. 2d (9th Cir.), cert. den., 269 U.S. 562 (1925); *Journigan v. State*, 233 Md. 405, 164 A. 2d 896, 898 (CCA 1960), cert. den. 365 U.S. 853 (1961). The advice of competent counsel, this Court has stated, furnishes a strong presumption of a valid waiver. *McMann v. Richardson*, 397 U.S. 759, 774 (1970). The Petitioners do not assert that they were coerced, or forced to plead nolo contendere. Petitioners do not assert that they were without adequate representation at any time following their arrest and brief confinement.

* The name of the "corporation court" was changed to "municipal court" by Acts 1969, 61st Legislature, Page 1689, Ch. 547. See Vernon's Ann. Civ. Stat., Art. 1194A.

The Petitioners plea of nolo contendere was the same as a plea of guilty insofar as the criminal prosecution was concerned, Texas Code of Criminal Procedure, Article 27.02. A plea of guilty, if voluntary and understandingly made is conclusive as to a person's guilt and constitutes a waiver of claimed deprivation of federal constitutional due process. *Fierro v. State*, 437 S.W. 2d 833 (Ct. Crim. App. 1969); *Soto v. State of Texas*, 456 S.W. 2d 389 (Ct. Crim. App. 1970), cert. den., 401 U.S. 942. This is particularly true in instances where a plea of guilty is given in a misdemeanor case. *Foster v. State*, 422 S.W. 2d 447 (Ct. Crim. App. 1968); *Utsman v. State*, 485 S.W. 2d 573 (Ct. Crim. App. 1972). This Court on several occasions held that constitutional rights were waived when a Defendant voluntarily entered a plea of guilty. *McMann v. Richardson*, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763; *Parker v. North Carolina*, 397 U.S. 790, 90 S. Ct. 1458, 25 L. Ed. 2d 785; *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747.

The Petitioners in launching their constitutional battle in Dallas' Municipal Court retained the right to relief to the State's appellate process. Article 44.17, Code of Criminal Procedure, State of Texas. The Petitioners have not shown how they were faced with any greater severity of punishment in the County Criminal Court of Appeals than they faced in Dallas' Municipal Court. This Court has previously held that a two-tier system such as exists in Texas is not violative of

procedural due process. *Colten v. Kentucky*, 407 U.S. 104 (1972).

Having once presented their claims to a state court, Petitioners should not be able to reject that judicial process by invoking solely the supplementary provisions of the Civil Rights Act of 1871 (42 U.S.C., Sec. 1983), *Buckner v. Crane*, 468 F. 2d 1228 (CCA 1972); *Coogan v. Cincinnati Bar Association*, 431 F. 2d 1209 (6 CA 1970); *Goss v. State of Illinois*, 312 F. 2d 257 (7 CA 1963). This Court has acknowledged on more than one occasion that a state court is presumed to be capable of fulfilling its solemn responsibility to guard, enforce every right granted or secured by the Constitution, *Allee v. Medrano*, 42 U.S.L.W. 4736 (May 20, 1974); *Robb v. Connally*, 111 U.S. 624, 637 (1884).

II.

THE PETITIONERS' COMPLAINT DOES NOT DEMONSTRATE A GENUINE THREAT OF PROSECUTION UNDER THE DISPUTED ORDINANCE AND SINCE THERE IS NO STATE PROSECUTION PENDING, THE PETITIONERS' COMPLAINT MUST FAIL BECAUSE OF MOOTNESS.

Petitioners cannot obtain declaratory relief where there is no state prosecution pending and there is not demonstrated a genuine threat of prosecution under the disputed ordinance. The Petitioners' past exposure to illegal conduct does not in itself show a case or controversy deserving of federal intervention. Past exposure to illegal conduct does not in itself show a present case or controversy unaccompanied by any continuing, present adverse effects. *O'Shea v. Littleton*, 42

U.S.L.W. 4139 (Jan. 14, 1974); *Zwickler v. Kotta*, 389 U.S. 241, 19 L. Ed. 2d 444, 88 S. Ct. 391 (1967).

The Petitioners' Complaint requests equitable relief as to only two of the named Defendants, Frank Dyson, individually in his capacity as Chief of Police of the City of Dallas, and Hugh Jones, individually and in his capacity as Clerk of the Corporation Court of the City of Dallas (A-9 and 10). The Defendants, Frank Dyson and Hugh P. Jones, are no longer employed by the City of Dallas. Further, Defendant Scott McDonald, former City Manager, has along with Dyson and Jones, retired from employment with the City of Dallas. The wrongful conduct charged in the Complaint is far the most part personal to the Defendants Frank Dyson and Hugh P. Jones, despite the fact that they were sued in their capacity as Chief of Police and Clerk of the Municipal Court. No charge is made in the Complaint that intentional practices of the former Chief of Police, Clerk of Municipal Court, and City Manager, are continuing as previously alleged. The Petitioners on Page 8 of their Brief even suggest that "Fresh evidence concerning the status and whereabouts of the Petitioners and enforcement patterns would be desirable." Petitioners have failed to substitute the names of the incumbent Chief of Police, City Manager, and Municipal Court Clerk for Dyson, McDonald and Hugh P. Jones.

The plain fact is that on the record before this Court the Petitioners are seeking specific equitable relief of persons no longer employed by the City of Dallas, persons no longer charged with the responsibility of administering or enforcing the criminal laws, statutes and ordinances of the State of Texas

and the City of Dallas. Under the circumstances of this case, the Petitioners have failed to establish the existence of a present controversy with Respondents. For these and the above and foregoing reasons the Petitioners' Complaint is moot. *Michael O'Shea,* supra.

III.

PETITIONERS' COMPLAINT DID NOT PRESENT A SUBSTANTIAL CONTROVERSY BETWEEN PARTIES HAVING ADVERSE LEGAL INTEREST OF SUFFICIENT IMMEDIACY AND REALITY TO WARRANT THE ISSUANCE OF A DECLARATORY JUDGMENT.

The Petitioners herein seek declaratory relief from possible future prosecution under the City of Dallas' Loitering Ordinance. The Supreme Court has repeatedly stated that the basic question in seeking a declaratory judgment the constitutionality of a statute is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy between the parties having adverse legal interests, of *sufficient immediacy and reality* to warrant the issuance of a declaratory judgment." *Golden v. Zwickler,* 394 U.S. 103, 22 L. Ed. 113, 118, 89 S. Ct. 956 (1969); *Maryland Casualty Co. v. Pacific Coal and Oil Co.,* 312 U.S. 270, 273, 85 L. Ed. 826, 828, 61 S. Ct. 510 (1941). (emphasis added)

The usual rule in federal cases is that an actual controversy must exist at all stages of appellate or certiorari review, and not just at the date the action is initiated. *Steffel v. Thompson,* 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974); *Roe v. Wade,* 410 U.S. 113 (1973); *United States v. Munsingerwear, Inc.,* 340 U.S. 36, 95 L. Ed. 36, 71 S. Ct. 104 (1950); *Golden v. Zwickler,* supra.

At the time of this review three of the named Respondents are no longer working in a representative capacity for the City of Dallas. The whereabouts of the Petitioners appears to be unknown (see Page 8 of Petitioners' Brief). Even if the Petitioners still reside in Dallas, an actual concrete personal threat of prosecution does not exist. The record shows that an average of approximately two persons per day were arrested under the disputed ordinance in 1972 (A-68). For the nation's eighth largest city with a 1970 census count of 844,401 persons and a county-wide population in excess of 1,327,000 persons,* it appears that there is an extremely remote possibility of any future arrest of Tom E. Ellis and Robert D. Love. The Petitioners have not shown how there is a pattern of arrest, upon any group of which they are a member, which would in any way increase their possibility of future arrest.

When it is wholly conjectural that a person seeking declaratory relief will be again prosecuted under a statute, such a person should not be granted declaratory relief. *Golden v. Zwickler,* supra. Unless the Petitioners can show that they face a genuine and immediate threat of future prosecution under Ordinance 31-60, their case has lost its character as a present live controversy of the kind that must exist if the Supreme Court is to avoid rendering advisory opinions on abstract propositions. *Hall v. Beals,* 396 U.S. 45, 24 L. Ed. 2d 214, 218, 90 S. Ct. 200 (1969); *Golden v. Zwickler,* supra; *Baker v. Carr,* 369 U.S. 186, 204, 7 L. Ed. 2d 663, 667, 82 S. Ct. 691 (1962).

The "normal course of state criminal prosecutions cannot

* U.S. Bureau of the Census, Census of Population and Housing, 1970.

be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future." *Boyle v. Landry*, 401 U.S. 77, 27 L. Ed. 2d 696, 700, 91 S. Ct. 758 (1971). Past exposure to illegal conduct does not in itself show a present case or controversy if unaccompanied by any continuing, present adverse effects. *O'Shea v. Littleton, supra.* The Second Circuit found a "very real threat of enforcement" before it affirmed the Three-Judge District Declaratory Judgment in *Thoms v. Heffernan*, 473 F. 2d 478, 485 (2 Cir. 1973). A trial court's Ruling to Dismiss was upheld largely based on its finding of "No present threat of any future injury," *Alga, Inc. v. Crossland*, 327 F. Supp. 1264, 1266, aff'd, 459 F. 2d 1038 (5 Cir. 1972), cert. den., 41 U.S.L.W. 329.

Even if the Petitioners' complaint had asserted the inadequacy of relief in the Dallas County Criminal Court of Appeals, this would be an argument that Tom E. Ellis and Robert D. Love should not be able to advance. The Petitioners never did make an attempt to obtain a trial de novo. These litigants can only assert their own constitutional rights, and cannot sue for the deprivation of someone else's civil rights. *U.S. v. Raines*, 362 U.S. 17, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960); *O'Malley v. Brierley*, 477 F. 2d 785 (3 Cir. 1973). The trial court did not rule that the named Petitioners, Tom E. Ellis and Robert D. Love, were properly representative of the class of persons they purport to represent in their Complaint. It is clear, however, that their standing cannot be acquired through the "back door of a class action." *Allee v. Medrano*, supra, and *O'Shea v. Littleton*, supra.

In rendering a determination in this present action this Court is still faced with the question of the applicability of *Younger v. Harris*, 401 U.S. 37 (1971). Respondents assert that standing and the continued existence of a live controversy as to the action and relation to the disputed ordinance depends on the pendency of prosecutions under the subject ordinance. To meet the *Younger* test the Petitioners would have to show bad faith harassment, or other unusual circumstances that would entitle them to federal declaratory relief.

This Court previously stated that it is a rare case where a single prosecution provides the quantum of harm that would justify federal intervention. *Allee v. Medrano*, 42 U.S.L.W. 4736; (see concurring opinions of Justice Stewart and The Chief Justice in *Steffel v. Thompson*, 42 U.S.L.W. 4357, 4365). The Petitioners' Complaint simply does not allege facts of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

IV.

SECTION 31-60 OF THE 1960 REVISED CODE OF CIVIL AND CRIMINAL ORDINANCES OF THE CITY OF DALLAS IS NOT FACIALLY UNCONSTITUTIONAL.

The Dallas City Ordinance is not unconstitutional either facially or otherwise. As was stated by the Supreme Court in *Boyce Motor Lines v. Village of Topeka Bay*, 72 S. Ct. 329, 342 U.S. 337, 96 L. Ed. 367 at page 371, "no more than a reasonable degree of certainty can be demanded" of a criminal statute. Petitioners in cases cited rely upon situations involving statutes giving unfettered discretion to local police officers, situations wherein there was bad faith enforcement and/or

situations in which the statutes sought to penalize individuals because of racial and socio-economic status.

The Dallas City Ordinance does not penalize individuals because of racial or economic status but applies to all individuals who are acting in such a way as to provide probable cause for alarm or concern for the safety and well-being of persons or for the security of property in their immediate surrounding area. The Ordinance does not leave it to the unfettered discretion of police officers to determine whether or not a person is in violation. The essential terms of the Dallas Ordinance are defined in detail within the Ordinance and in addition thereto sets up guidelines to be used by officers in making a determination of probable cause for alarm and concern. This Ordinance, as is the case for any ordinance or statute, must be taken as a whole, and when interpreted from its four corners it is not so vague or indefinite as to be facially unconstitutional. This Court in *Colten v. Commonwealth of Kentucky*, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 at page 590 said:

> "The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into constitutional dilema the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited."

In *U.S. v. Woodard*, 376 F. 2d 136 (7th Cir. 1967), the Court stated at page 140 as follows:

> "The Constitution does not require impossible standards of specificity in penal statutes. It requires only that the statute convey 'sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice.' United States v. Petrillo, 332 U.S. 1, 8, 67 S. Ct. 1538, 91 L. Ed. 1877."

The Dallas Ordinance when measured by this criteria is not unconstitutional.

The Dallas City Ordinance is a proper exercise of the police powers of the City of Dallas with a view toward the *prevention* and the *protection* of its citizens. The Ordinance is a valid and necessary tool for law enforcement personnel to safely carry out their duties to prevent crime and protect property.

V.

PETITIONERS ARE NOT ENTITLED TO FEDERAL EXPUNGEMENT OF A VALID CONVICTION WHERE THEY HAVE WAIVED THEIR RIGHT TO APPEAL IN THE STATE COURTS.

Expungement has been ordered by a federal court of arrest records and convictions to eliminate the effects of illegal arrests. See *Sullivan v. Murphy*, 478 F. 2d 938 (D.C. Cir. 1973), *Menard v. Mitchell*, 430 F. 2d 486 (D.C. Cir. 1970), *United States v. McLeod*, 385 F. 2d 734 (5 Cir. 1967).

However, no federal court has ordered expungement of a final conviction which was not the basis of harassment and in which injunctive relief had not been sought. See generally *United States v. McLeod*, supra.

Petitioners have not shown that this prosecution was affected for harrassment purposes or that proper relief was sought to restrain the prosecution, either in the state or federal forum.

Respondents do not question the remedial powers of a federal court. However, Petitioners are precluded from outright physical expungement of their convictions where state law requires

an entry of the disposition in each case. Texas Code of Criminal Procedure, Art. 45.13. Having elected to proceed in the state court and there having waived their right of appeal, Petitioners may not later complain that a conviction, valid when entered, is invalid and requires expunction should the ordinance used in the prosecution later be held unconstitutional. In this case the Petitioners would be only entitled to an entry on the state court records showing the final disposition of this present action.

CONCLUSION

Respondents respectfully submit that the Petitions have not shown by this present action that they are entitled to federal equitable relief for the following reasons:

(1) When the Petitioners voluntarily plead guilty in the state court to violating Section 31-60 of the Revised Code of Civil and Criminal Ordinances of the City of Dallas, they waived their right to further present their constitutional claims which comprise the basis of this present action;

(2) The Petitioners' complaint must fail because of mootness;

(3) Petitioners' complaint did not present a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment and the granting of other equitable relief.

Respondents assert that based on the foregoing the trial court did not abuse its discretion in dismissing the Petitioners' complaint.

WHEREFORE, PREMISES CONSIDERED, Respondents pray judgment of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do certify that a true and correct copy of this Brief has been served upon Mr. Walter W. Steele, Jr., 3315 Daniels, Dallas, Texas 75205, Attorney for Petitioners, by depositing the same in the United States Certified Mail, Return Receipt Requested, on this the 21 day of August, 1974.

D H Conner

Douglas H. Conner